No. _____

In The Supreme Court of the United States

October Term, 1997

DAVID CONN and CAROL NAJERA, *Petitioners,*

vs.

PAUL L. GABBERT, *Respondent.*

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN J. RENICK, Esq.
Counsel of Record
MANNING, MARDER & WOLFE
45th Floor at First Interstate Tower
707 Wilshire Boulevard
Los Angeles, CA 90017
Telephone: (213) 624-6900

Counsel for Petitioners,
DAVID CONN and CAROL NAJERA

12 pp

QUESTION PRESENTED

The question presented by this petition consists of a cascading series of sub-issues, as follows:

1. Is there federally protected right for a witness testifying before a grand jury to consult with his or her attorney at will outside of the grand jury room, such that interference with such consultation would form the basis for an action pursuant to 42 U.S.C §1983 *by the attorney* for violation of his constitutionally protected right to practice his profession?

2. If so, is the right to practice a profession (such as law) limited to the basic right to seek and maintain employment in that profession, or does it encompass the day-to-day activities of that profession as well (such as consulting with a particular client on a particular occasion), such that that interference with such day-to-day activities would form the basis for an action pursuant to 42 U.S.C §1983 by the professional for violation of his or her right to practice his or her profession?

3. If the right to practice a profession does encompass the day-to-day activities of that profession, is the proper test for resolving whether there has been an undue and unreasonable interference with that right to determine whether the state action interfered with the professional's ability "to practice according to the highest standards of that profession?

4. If all of this is so, was this right, in this form and scope, so clearly established that no reasonable public official, such as the two deputy district attorneys involved here, could have believed that their actions were lawful?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below):

DAVID CONN and CAROL NAJERA
represented by Steven J. Renick, Esq., MANNING, MARDER & WOLFE, 45th Floor at First Interstate Tower, 707 Wilshire Blvd., Los Angeles, CA 90017; (213) 624-6900

Respondent (plaintiff and appellant below):

PAUL L. GABBERT
represented by Michael Lightfoot, Esq., TALCOTT, LIGHTFOOT, VANDEVELDE & SADOWSKY, 655 South Hope Street, 13th Floor, Los Angeles, CA 90017; (213) 622-4750

Additional defendants and appellees below:

LESLIE ZOELLER and ELLIOT OPPENHEIM
represented by Scott D. MacLatchie, Esq., FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, 225 South Lake Avenue, Penthouse, Pasadena, CA 91101; (818) 304-7830

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES AND RULES

APPENDICES

A: OPINION of the United States Court of Appeals for the Ninth Circuit, filed December 8, 1997

B: ORDER of the United States District Court for the Central District of California, filed September 30, 1994

C: ORDER RE: LEAVE TO AMEND of the United States District Court for the Central District of California, filed February 8, 1995

D: SEPARATE STATEMENT OF UNCONTROVERTED MATERIAL FACTS AND CONCLUSIONS OF LAW of the United States District Court for the Central District of California, filed October 3, 1995

E: JUDGMENT of the United States District Court for the Central District of California, filed October 3, 1995

F: ORDER of the United States Court of Appeals for the Ninth Circuit, filed February 2, 1998

CITATIONS FOR OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 131 F.3d 793 (9th Cir. 1997). The order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* (Appendix F) was not reported. The opinions of the District Court (Appendices B, C, D, and E) are unreported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on December 8, 1997. That Court denied the petitioner's petition for rehearing and suggestion for rehearing *en banc* on February 2, 1998. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review on a writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondent pursuant to 42 U.S.C. §1983, which at the time this action was filed read as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the Unites States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The respondent alleges that the petitioners deprived him of rights secured by the Fourth and Fourteenth Amendments, the relevant parts of which read as follows:

> FOURTH AMENDMENT: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

> FOURTEENTH AMENDMENT (Section 1): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Procedural History

Respondent filed suit in the United States District Court for the Central District of California on June 23, 1994 against the petitioners and others asserting two claims for relief arising under 42 U.S.C. §1983. (1 Excerpts of Record on Appeal [ER] 1, 17, 20) The basis for jurisdiction of the respondent's action in the District Court was 28 U.S.C. §§1331 and 1343. (1 ER 1)

On September 30, 1994, the District Court granted in part and denied in part the petitioners' motion to dismiss made pursuant to Federal Rules of Civil Procedure rule 12(b)(6), dismissing all of the respondent's claims except for his Fourteenth Amendment claim for interference with his right to practice his profession. (See Appendix B, page B-21.) On February 8, 1995, the District Court denied respondent's motion for leave to file a First Amended Complaint to add a state law cause of action under California Penal Code section 1524. (See Appendix C, pages C-2 and C-5.) On October 3, 1995, the District Court granted summary judgment in favor of the petitioners and against the respondent. (See Appendices D and E.)

The respondent appealed to the United States Court of Appeals for the Ninth Circuit. On December 8, 1997, the Court reversed the summary judgment granted in favor of the petitioners. It also reversed the dismissal of the respondent's Fourth Amendment claims as to petitioner David Conn. (See Appendix A, page A-25.) On February 2, 1998, the Court denied the petitioners' petition for rehearing and rejected the petitioners' suggestion for rehearing *en banc*. (See Appendix F.)

The Underlying Facts

Traci Baker testified as a witness for the defense at the highly publicized first trial of Erik and Lyle Menendez. Thereafter, the District Attorney's office learned of the existence of a letter purportedly written by Lyle Menendez to Ms. Baker that was described as a "script for her testimony", and began an investigation. (1 ER 50) In response, Baker, on or about February 11, 1994, hired respondent Paul Gabbert, a veteran criminal defense attorney, to represent her. (1 ER 4)

On Thursday, March 17, 1994, Baker was served with a subpena to testify before the grand jury on the following Monday, March 21, 1994. (1 ER 6) The subpena required Baker to bring with her "any correspondance [sic] from Lyle Menendez." (1 ER 27) On Friday, March 18, 1994, Gabbert's ex parte application on behalf of Baker to shorten time for the hearing of a motion to quash the subpena was denied. (1 ER 7)

On March 18, 1994, Det. Leslie Zoeller of the Beverly Hills Police Department, the investigating officer for the Menendez murder case, obtained a warrant to search the apartment belonging to Baker for any correspondence from Lyle Menendez or related materials. (1 ER 31-33) Det. Zoeller, accompanied by petitioners David Conn and Carol Najera, Deputy District Attorneys working on the Menendez case, served the search warrant on Baker at her apartment on March 18th. Upon being served with the search warrant, Baker voluntarily stated that "all the things that you're looking for are with my attorney." (2 ER 478)

On Monday, March 21, 1994, Gabbert and his client appeared as noticed for Baker's testimony before the grand jury. (1 ER 9) Based on a conversation that he had with Gabbert at the courthouse, Conn came to the conclusion that

Gabbert had in his possession the documents requested in the search warrant. He then asked his secretary and Det. Zoeller to add to the existing warrant a request to search Gabbert. (2 ER 417-419) Det. Zoeller obtained second search warrant, this time authorizing a search of both Gabbert and Baker for "any and all correspondence between Tracy Baker and Lyle Menendez." The warrant provided that the search of appellant was to be conducted by a special master, Elliot Oppenheim. (1 ER 44-45)

While Gabbert and his client were waiting in the grand jury's witness room, Det. Zoeller served the search warrant on the appellant. After Oppenheim was introduced to the appellant, Gabbert himself stated "We'll need a private room." (2 ER 352) He and Oppenheim then went to a private room where the special master conducted his search. (1 ER 56) Conn and Najera then entered the grand jury room. Det. Zoeller was then called to testify as a witness before the grand jury, and after his testimony concluded, Baker was called to testify. (2 ER 400-401) Conn and Najera remained in the grand jury room during the course of both Det. Zoeller's and Baker's testimony. (1 ER 279, 285)

Upon being asked the first question of her examination by Najera before the grand jury, Baker requested to speak with her attorney, which request was granted. (2 ER 515) Upon exiting the grand jury room, Baker looked for Gabbert, but did not see him. So she asked a woman who was there if she knew where the respondent was. (2 ER 380) The woman, Conn's secretary, went over to the room where Gabbert was being searched by Oppenheim and informed him that his client wished to speak with him. (2 ER 507-508) Gabbert responded that:

> "'I can't talk to her right now,' words to that effect. 'I'm being searched.'

> And she says, 'She has to talk to you right now.' She either says, 'Because she has to go back in the grand jury' or this was clear in the context that it was most urgent.
>
> And I said, in effect, 'That's tough. They created this situation. They can wait as long as it takes.'" (2 ER 355-356)

Baker was able to see Gabbert and believed that they communicated. She felt that he advised her to assert her Fifth Amendment rights. (2 ER 383-384) Baker returned to the grand jury room, and, when the (first) question was repeated to her, she responded, "Based on the advice of my counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." (2 ER 516) Based on that response, both Conn and Najera believed that Baker had in fact conferred with her attorney. (2 ER 280, 286)

When Najera then asked the witness a second question, Baker again asked to speak with her attorney, and she was again permitted to do so. (2 ER 516) Baker exited the grand jury room and again was unable to see the respondent. But this time she did nothing to locate Gabbert and simply waited outside the grand jury room. Finally, she was told she could not wait any longer and had to return to the grand jury room. (2 ER 388)

When she returned before the grand jury and the second question was repeated to her, Baker responded, "Again, based on the advice of my counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." (2 ER 517) Based on that response, both Conn and Najera again believed that Baker had in fact conferred with her attorney. (2 ER 281, 287)

Baker was then asked whether she had brought with her the documents identified in the subpena. When she again asked to speak with her attorney, Conn advised the foreperson of the grand jury that it appeared to be time to consult with the presiding judge to determine whether a contempt citation should be issued against the witness. The proceedings were recessed for ten minutes to permit the consultation and Baker was excused. (2 ER 517-518) When she exited the grand jury room for the recess, she found that Gabbert was now present. (2 ER 389)

Following the search of the respondent by Oppenheim (which did not result in the seizure of any items by the special master, although Gabbert voluntarily provided Oppenheim with two photocopied pages of a letter from Lyle Menendez to Baker), Gabbert had returned to the anteroom outside the grand jury room. There, he was allegedly approached by Conn, who advised him that since Oppenheim had determined "'that none of the items in your briefcase are privileged'", Det. Zoeller was going to conduct a second search of him. (2 ER 359) No items were seized pursuant to this second search, after which Gabbert proceeded to another courtroom to represent Baker at a preliminary contempt hearing. (2 ER 400, 520) No ruling was made at that time but instead the matter was set for a further hearing, which apparently never took place and the contempt proceedings against Baker were dropped. (2 ER 542)

REASONS FOR GRANTING CERTIORARI

As noted in the Question Presented, the issue on this petition is not a simple question of the propriety of a straightforward explicit holding by the Court of Appeals. Rather, it is the Court's decisions on four sub-issues that led to a finding that there was a triable issue as to whether the respondent had a viable claim under the Fourteenth Amendment against the petitioners for their alleged interference with his right to practice his profession. In order to meaningfully discuss those four sub-issues, and why this Court should grant certiorari to review them, it is best to begin by "deconstructing" the Court of Appeals decision to understand the interplay of those four issues.

1. THE COURT OF APPEALS' HOLDING ON RESPONDENT'S FOURTEENTH AMENDMENT CLAIM IS MUCH BROADER THAN THE COURT ADMITS TO IN ITS OPINION

The Court of Appeals, in its opinion, wrote that "[w]e hold that Gabbert had a clearly established right to pursue his profession without undue and unreasonable governmental interference and that no reasonable prosecutor or police officer could have believed that the worst of this conduct was lawful." (Appendix, A-13) However, this statement does not fully set out the holdings of the Court of Appeals in regard to the respondent's Fourteenth Amendment claim.

The Court of Appeals first rejected out-of-hand the notion that petitioners Conn and Najera are entitled to absolute immunity (see *post*, page 22, footnote *), and then analyzed whether they were entitled to qualified immunity.

The Court of Appeals stated that the constitutional right at issue here was that "the Fourteenth Amendment protects an individual's right to practice a profession free from undue and unreasonable state interference". (Appendix, A-11) However, the term "practice" can mean two different things in this context, either the basic matter of engaging at all in a particular profession, or the day-to-day transaction of that profession. Given the Court of Appeals' findings, and the arguments contained in the opinion, it is clear that the Court of Appeals was using the term "practice" in the *second* sense. Therefore, the specific constitutional right that the Court of Appeals determined was at issue here -- and therefore found to exist -- is that the Fourteenth Amendment protects an individual's right to engage in the day-to-day activities of his or her profession free from undue and unreasonable state interference.

Next, the Court of Appeals stated that "[t]he unusual facts of this case preclude 'the very action in question' to be clearly established in our case law" (Appendix, A-12), but nonetheless found that the right was clearly established because "long-standing precedent establishes the importance of the attorney-client relationship during a client's grand jury testimony." (Appendix, A-12 through A-13)

> "[A] witness has the right to consult with her attorney outside the grand jury room. This right to assistance is clearly established in this and other circuits. The witness's clearly established right to assistance, however, cannot be exercised if government officials unnecessarily interfere with an attorney's ability to provide that advice.
>
> A constitutional right may be clearly established 'both by common sense and by

> precedent.' *Both clearly establish that the right to practice a profession necessarily includes the right to practice according to the highest standards of that profession.* ... Common sense necessarily leads to the conclusion that an attorney has the right to practice his profession in privacy and freedom from unreasonable intrusion *by 'waiting outside the grand jury room'* during his client's testimony. Therefore, we hold that Gabbert had the clearly established right to practice law free from undue and unreasonable governmental interference." (Appendix, A-13; emphasis added, citations omitted.)

The Court of Appeals thus decided that, given the constitutional right it had found for individuals to engage in the day-to-day activities of their professions without unreasonable interference, *any public official should have known,* through the use of simple common sense, that attorneys have a clearly established *constitutional* right to wait outside a grand jury room while their clients testify within.

The term "outside" can also have two meanings in this context. It can mean directly outside the door, i.e. the location where the witness would necessarily encounter the attorney the moment the witness stepped outside of the grand jury room. Or the word can simply mean the opposite of "inside", i.e. a location reasonably accessible to the witness that is not inside the grand jury room, a location which need not necessarily be directly outside the jury room door itself.

Since Gabbert *was* in fact accessible to Baker during her testimony before the grand jury and she in fact would have been able to consult with him but for *his* refusal to speak with her (see *ante,* pages 5-6), it is clear that the Court

of Appeals is using the term "outside" in the first sense. In other words, it appears that the Court of Appeals found that an attorney has a clearly established constitutional right to wait *directly outside the door* to the grand jury room during the entire time his or her client testifies inside. However, to be charitable, it will be assumed that what the Court of Appeals actually meant was that attorneys have a clearly established constitutional right to be *immediately* available, as opposed to merely being reasonably accessible, to their clients outside the grand jury room during the time the clients testify inside. (See Appendix, A-17, asserting that an attorney's right to practice his or her profession is violated when he or she is prevented "from offering legal assistance to the client in the very matter *and at the very moment* for which the lawyer was retained." [emphasis added])

Having set out the "clearly established" parameters of the "constitutional right" it found to be at issue here, the Court of Appeals proceeded to apply its findings to the facts of this case, to determine "whether a reasonable official could have believed the conduct at issue was lawful under the clearly established law" (Appendix, A-14), noting that it was to "decide whether the officials' actions were objectively reasonable under the facts and circumstances, *without regard to their underlying intent or motivation."* (Ibid.; emphasis added.) The Court of Appeals then held that:

> "The only *apparent* reason to have [the execution of the search warrant on Gabbert and his client's grand jury appearance] occur at the same time was the prosecutors' *desire* to prevent Gabbert from communicating with his client. . . . . [¶] The prosecutors chose ... [to execute] the search warrant on Gabbert at

> almost the exact time Baker was being haled into the grand jury room. *The plain and intended result* was to prevent Gabbert from consulting with Baker during her grand jury appearance. These actions were not objectively reasonable, and thus the prosecutors are not protected by qualified immunity from answering Gabbert's Fourteenth Amendment claim." (Appendix, A-14 through A-16; emphasis added, footnotes omitted.)

In reaching this conclusion, the Court of Appeals did not find to be of any significance, and indeed did not even address, the point that Baker in fact was not "prevented" from consulting with Gabbert. (See *ante,* pages 5-6, 10-11.) In light of this, it is clear that the Court of Appeals found the supposed actions of the prosecutors objectively unreasonable not because they *prevented* Gabbert from consulting with Baker, as the opinion's language would suggest, but rather because the Court of Appeals found that those actions "unduly and unreasonably *interfere*[*d*]" with (Appendix, A-17) rather than prevented, Gabbert's ability to consult with Baker.

This interpretation is supported by the Court of Appeals' rejection of "the prosecutors' argument that their actions were objectively reasonable because they had no reason to know that Baker did not, in fact, consult with Gabbert when she left the grand jury room." (Appendix, A-16, fn. 5.)

> "It is true that, upon Baker's return to the grand jury room, she invoked her privilege against self-incrimination on 'the advice of counsel.' Baker's prepared statement,

> however, does not make the prosecutors' actions objectively reasonable. At best, *the prosecutors had to know that Gabbert was distracted from giving his full attention and advice to Baker. This distraction prevented Gabbert from practicing his profession 'according to the highest standards.'* [Citation.]" (Ibid.; emphasis added.)

Thus, the basis for the Court of Appeals' determination that the prosecutors' alleged misconduct was objectively unreasonable becomes clear. The Court of Appeals found that the defendants' actions unduly and unreasonably interfered with Gabbert's ability to consult with Baker *because those actions distracted him from giving his full attention and advice to his client, thereby preventing Gabbert from practicing his profession "'according to the highest standards.'"*

2. THIS CASE IS THE FIRST ONE TO FIND THAT THE RIGHT TO PRACTICE ONE'S PROFESSION ENCOMPASSES THE DAY-TO-DAY ACTIVITIES OF THAT PROFESSION

At issue in this case was not Mr. Gabbert's ability to practice the profession of law. It was not his ability to practice a particular type of law. It was not his ability to represent certain types of clients. It was not even his ability to represent a particular client in a specific case. It was the alleged interference with his ability to provide legal assistance to one individual client on a specific occasion in the course of his overall representation of that client in a criminal matter. The petitioners are not aware of any other

case in which the recognized right to practice own's profession has been taken to such extremes, and such a finding seems to be at odds with the thrust of the decisions of this Court in this area.

In *Board of Regents v. Roth,* 408 U.S. 564, 575 (1972), an assistant professor at a state university claimed that the decision not to rehire him after his first academic year infringed on his Fourteenth Amendment rights. This Court held, among other things, that "[i]t stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another", citing to its earlier decision of *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy,* 367 U.S. 886, 895-896 (1961).

In *Cafeteria and Restaurant Workers Union,* this Court found that denial of a security clearance for an employee on a military base, effectively terminating her employment, did not impact the employee's "right to follow a chosen trade or profession. [Citations.] [She] remained entirely free to obtain employment as a short-order cook or to get any other job, ... All that was denied her was the opportunity to work at one isolated and specific military installation." (*Id.* at 895-896.) The Court contrasted this situation with three other cases, in which an applicant was denied permission to sit for the New Mexico state bar examination because of his past membership in the Communist Party (*Schware v. Board of Bar Examiners,* 353 U.S. 232 (1957)), in which a physician was denied a certificate to practice medicine (*Dent v. State of West Virginia,* 129 U.S. 114 (1889)), and in which a cook, a legal resident alien, sought to prevent his likely firing pursuant to a state law that mandated that all employers of more than five persons were required to maintain a workforce that was 80% citizen (*Truax v. Raich,* 239 U.S. 33 (1915)).

Unlike the case then before the Supreme Court, those earlier decisions involved situations where the petitioner was either entirely prevented from working in his or her chosen profession (*Schware* and *Dent*), or effectively prevented from working in any profession at all (*Truax*). That was not the situation at issue in this case, which is closer factually to those in *Board of Regents* and in *Cafeteria and Restaurant Workers Union*, which involved plaintiffs who were denied only the opportunity to continue in one particular position with one particular employer, but remained free to pursue his or her profession by seeking other positions with other employers. Here, Gabbert did not suffer even that minimal deprivation.

In *Meyer v. State of Nebraska,* 262 U.S. 390, 400-401 (1923), the petitioner was convicted of violating a statute which prohibited teaching modern foreign languages to children who had not yet passed the eighth grade. This Court reversed, finding that the "[p]laintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] amendment. ... [T]he Legislature has attempted materially to interfere with the calling of modern language teachers, with opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." Unlike the situation in the present appeal, the State of Nebraska was seeking to entirely forbid a professional from engaging in at least a portion of his or her practice.

None of these cases involved the day-to-day activities of the practice of a profession. There clearly is a difference between entirely depriving someone of the right to participate in a particular field of endeavor and simply engaging in actions that might interfere with the specific manner in which

that participation occurs. The former goes to the heart of the liberty interests protected by the Fourteenth Amendment and obviously should be subject to oversight by the federal courts.

But is it really appropriate, as the Ninth Circuit has now decided, to require the federal courts to micro-manage the States' day-to-day relationships with its professionals? (And the present case clearly cannot be limited to attorneys, but logically must apply to *all* professionals.) We are not dealing here even with a pattern of individual slights whose cumulative effect is to substantially interfere with an attorney's overall ability to engage in the practice of his profession. At issue here is a *single* incident, with a specific and limited impact on the respondent. Does that truly impact the liberty interests of the Fourteenth Amendment, such that it justifies "making it into a federal case"? In light of this Court's decisions in *Board of Regents v. Roth* and *Cafeteria and Restaurant Workers Union,* the answer clearly should be "no".

Accordingly, unless this Court wants to see a host of civil rights actions brought on the basis of alleged state interference with the day-to-day activities of professionals, it must grant this petition and reverse the Court of Appeals.

3. THIS COURT HAS NOT FOUND THERE TO BE A RIGHT OF WITNESSES TO CONSULT WITH AN ATTORNEY *WHILE* THEY ARE TESTIFYING BEFORE A GRAND JURY, AND THERE IS NO GOOD REASON WHY SUCH A RIGHT SHOULD BE RECOGNIZED

In its opinion, the Court of Appeals found that "a witness has the right to consult with her attorney outside the

grand jury room. This right to assistance is clearly established in this and other circuits." (Appendix, A-13) It was on the basis of this allegedly clearly established right that the Court concluded that the petitioners here should have known that their supposed interference with Mr. Gabbert's ability to assist his client violated a clearly established right. But the case law does not support the Court of Appeals' conclusion that this right even exists.

The Court of Appeals cited to *United States v. Mandujano,* 425 U.S. 564, 581 (1976). But in that case, this Court did *not* hold, as the Ninth Circuit incorrectly states, that "a witness has the right to consult with her attorney outside the grand jury room." This Court merely noted that the prosecutor offered the witness the option of leaving the grand jury room to consult with counsel. It did not hold that the prosecutor was *obliged* to make such an offer. This Court's citation to *Mandujano* in *United States v. Williams,* 504 U.S. 36, 49 (1992) cites to the case for the proposition that the Sixth Amendment right to counsel does *not* attach when a witness is required to appear before a grand jury, making it unclear how *Mandujano* could possibly stand for the proposition that there is a right to consult with one's attorney during the grand jury proceedings, but no right to *have* an attorney in the first place.

The Courts of Appeal of the various circuits have not clarified the situation. The First Circuit, in *In re Grand Jury Proceedings,* 859 F.2d 1021, 1024 (1st Cir. 1988) merely notes that "courts generally recognize a witness's right to consult with an attorney outside the grand jury room", citing solely to *Mandujano.* The Second Circuit, in *United States v. Schwimmer,* 882 F.2d 22, 27 (2nd Cir. 1989) confusingly explains *Mandujano* as providing that "a grand jury witness who had a right to the assistance of counsel could not insist that his attorney accompany him in to the grand jury room",

leaving open the question of *when* a grand jury witness has the right to assistance of counsel. The Fourth Circuit, in *In re Special Grand Jury No. 81-1,* 676 F.2d 1005, 1010 (4th Cir. 1982) notes that "in many circuits [a witness] has the right to consult with his attorney outside the grand jury room ..."

The Eighth Circuit affirmatively asserts that "witnesses are entitled to have their counsel outside the room and to consult with their counsel whenever necessary." (*In re Matter of Grand Jury Subpoena,* 739 F.2d 1354, 1357 (8th Cir. 1984).) The Ninth Circuit also recognizes such a right. (See the opinion below, at Appendix, A-13, and *United States v. Plache,* 913 F.2d 1375, 1380 (9th Cir. 1990); but see *In the Matter of the Grand Jury Subpoena Issued to David Z. Chesnoff, Esq.,* 62 F.3d 1144, 1146 fn.2 (9th Cir. 1995) ["Perry has no legal or constitutional entitlement to counsel of his choice during a grand jury investigation."].)

Given that this Court has strongly suggested that the Sixth Amendment right to counsel does not attach to grand jury proceedings (see *U.S. v. Williams, supra,* 504 U.S. at 49), it is hard to understand how the mere procedural right of consulting with an attorney during such proceedings could be a constitutional imperative. Such a constitutionally based right would at odds with how witnesses must act in relation to other testimonial proceedings. There is, of course, no right for a witness to interrupt trial proceedings to consult with an attorney. And some District Courts preclude such consultations even during the course of depositions. (See, e.g. *Hall v. Clifton Precision,* 150 F.R.D. 525, 528-529 (E.D. PA 1993); *Armstrong v. Hussman Corporation,* 163 F.R.D. 299, 302-303 (E.D. MO 1995).)

If we are to agree that witnesses before a grand jury have the right to pop in and out of the proceeding as they

wish (the Court below noted that the respondent's claim against the petitioners was that their actions had "prevented him from freely rendering legal assistance to his client *whenever she chose to seek his advice regarding her grand jury testimony"* (Appendix, A-11, fn.2; all emphasis added)), then why bother keeping the attorneys out of the grand jury room? The only thing accomplished thereby is to slow the entire process as the witness goes in and out of the grand jury room. But he or she is getting to consult with his or her attorney just as much as if the attorney were present in the grand jury room with the witness.

In other words, if there is no right to have an attorney present in the grand jury room, then it must be because there is no right for the witness to disrupt the proceedings by frequent consultations with his or her attorney. (Here, Baker asked to speak with Gabbert after *each* of the three questions posed to her.) Otherwise, the ban serves no logical purpose.

This Court should issue a writ of certiorari and resolve this question. Either allow attorneys into the grand jury room, or require witnesses before the grand jury, like witnesses at trial, to testify without consulting with their attorney before each answer.

///

///

///

4. ASSUMING THAT INTERFERENCE WITH AN ATTORNEY'S ABILITY TO CONSULT WITH HIS CLIENT DURING GRAND JURY TESTIMONY IS AN ACTIONABLE VIOLATION OF THE ATTORNEY'S RIGHT TO PRACTICE HIS OR HER PROFESSION, IS THE PROPER TEST FOR SUCH INTERFERENCE WHETHER IT PREVENTS THE ATTORNEY FROM PRACTICING ACCORDING TO THE "HIGHEST STANDARDS" OF THE PROFESSION?

The case below did not involve a situation where state officials physically prevented an attorney and his client from consulting. Baker was allowed to leave the grand jury room. She was taken to where Gabbert was being searched. Gabbert was told his client needed to speak with him. Nothing in the record suggests he was prevented from speaking with her by the petitioners or any other state official. Rather, he simply *chose* not to speak to her. (See *ante,* pages 5-6.)

The Court of Appeals avoids having to explain why this conduct did not amount to a waiver of any Fourteenth Amendment claim the respondent might have had by holding that "the right to practice a profession *necessarily* includes the right to practice according to the *highest standards* of that profession" (Appendix, A-13), and finding that the petitioners had to know that Gabbert would be "distracted from giving his full attention and advice to Baker", thus preventing him "from practicing his profession 'according to the highest standards.'" (Appendix, A-16, fn.5)

The only case the Court was able to find to support this conclusion was *Keker v. Procunier,* 398 F.Supp. 756

(E.D. Cal. 1975). But in that case, the District Court's primary focus and concern was the impact the challenged prison conditions had on the ability of inmates to have access to their attorney, rather than on the attorneys' professional rights in isolation. (*Id.* at 761-763.) Here, the primary (if not sole) focus was on the attorney's rights.

To set the test for violations of this "right" as whether there has been interference with the ability of a professional to practice to the "highest standards" of his or her profession is to put an impossible burden on state officials. Virtually *any* act might "distract" a professional, therefore interfering with his or her ability to practice to the highest standards of the profession. What if the bus transporting prisoners to court from the jail is delayed, thus limiting the amount of time the prisoners' attorneys can spend with them prior to hearings or trials? What if a questionable traffic stop prevents, or even just delays, an attorney on his or her way to an important hearing? What if the driver is a doctor, on the way to perform surgery? If the doctor thereafter commits malpractice, can he or she sue for indemnification as well as compensation? What if a decision is made to search a lobbyist before he or she is allowed to enter a public building? Can the lobbyist sue if this upsets him or her, thereby preventing the lobbyist from providing the best lobbying effort to his or her client?

And the situation facing prosecutors is even grimmer. The daily disputes between prosecutors and defense attorneys often become heated and acrimonious. Can prosecutors be sued if the defense attorney then claims that he or she could not provide the best possible defense to his or her client? Here, for example, the entire case turns on the timing of the decision when to call Ms. Baker in before the grand jury. The Court of Appeals concluded that the timing of Ms. Baker's testimony and the search of Mr. Gabbert was a

deliberate effort on the part of the prosecutors to sabotage the ability of the respondent to provide legal assistance to his client. But, as the Court of Appeals noted (although did not seem to take to heart), the actions of public officials are judged on an objective standard, "without regard to their underlying intent or motivation." (Appendix, A-14) Does this mean that if these prosecutors in fact innocently caused the search and the testimony to occur simultaneously, they would *still* be subject to suit, because they should have recognized the possible impact this might have on the attorney's ability to practice to the highest standards of his profession?* After all, the Court of Appeals intimated that *merely distracting* the attorney would be sufficient to establish a cause of action under the right described by the Court in its opinion. (Appendix, A-16, fn.5)

If this Court chooses to allow the scope of the right to practice one's profession to expand to encompass the day-to-day activities of professionals, it cannot allow the "highest standards" test to be the deciding factor. Given that the prior cases in this area have dealt with situations where people were *entirely* deprived of their ability to engage in

---

* This is why the petitioners are so troubled by the Court of Appeals' almost casual rejection of the idea that the petitioners are entitled to absolute immunity for their actions here. (Appendix, A-9 through A-10) The decision of *when* to call a witness to testify before a grand jury *clearly* is exclusively a prosecutorial function, not an investigative activity. Yet the petitioners are being held to answer civilly for this act of prosecutorial discretion. Without the power given to them *as prosecutors* to determine when Baker testified, it would be impossible for the respondent to even make out a rational claim here. Therefore the petitioners *should* have been granted absolute immunity.

a profession, it would seem more appropriate to set a similar standard here. That is, that the interference must be such as to prevent the professional from practice even up to the *minimal* standards of the profession. In other words, situations where the client is deprived of *any* effective service from the professional, not simply those occasions where the professional performs competently, but not necessarily to the very best of his or her abilities.

This Court should grant this petition to clarify this issue before a host of cases get filed based on violations of the extraordinarily high standard established by the Court of Appeal below.

5. CAN IT HONESTLY BE SAID THAT THIS RIGHT WAS SO CLEARLY ESTABLISHED AS TO PRECLUDE GRANTING THE PETITIONERS QUALIFIED IMMUNITY?

The foregoing discussion makes clear just how unclear and uncertain is the "right" promulgated by the Court of Appeals in this case. To hold that these two petitioners should have known that what they allegedly did violated this "right" is patently unfair. There is simply no way that they, or anybody else (including the District Judge that granted their motion for summary judgment), would have understood that their actions violated *this* "right", a right that only exists because the Court of Appeals tied together several different legal threads to create a new constitutional tapestry. (See *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), holding that to preclude the application of qualified immunity, "[t]he contours of the right [allegedly violated] must be sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right.")

The Court of Appeals decision to deny qualified immunity to these petitioners flies in the face of this Court's standards for granting, or withholding, such immunity, and accordingly it should grant this petition to prevent the opinion below from setting a new standard for such decisions.

CONCLUSION

For all these reasons, the petitioners urge the Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: May _____, 1998

Respectfully submitted,

MANNING, MARDER & WOLFE

By: _____

STEVEN J. RENICK
Counsel of Record
Attorneys for Petitioners
DAVID CONN and CAROL NAJERA

FOR PUBLICATION

UNITED STATES COURT OF APPEALS,
FOR THE NINTH CIRCUIT

PAUL L. GABBERT, *Plaintiff-Appellant,*	)	No. 95-56610
v.	)	D.C. No. CV-94-04227-RSWL
DAVID CONN; CAROL NAJERA; LESLIE ZOELLER; ELLIOT OPPENHEIM, *Defendants-Appellees.*	)	OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
September 11, 1997 -- Pasadena, California

File December 8, 1997

Before: Harry Pregerson and Michael Daly Hawkins, Circuit Judges, and Charles R. Weiner,* District Judge.

Opinion by Judge Hawkins

*Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

COUNSEL

Michael J. Lightfoot, Talcott, Lightfoot, Vandevelde & Sadowsky, Los Angeles, California for the plaintiff-appellant.

Robert S. Wolfe and Steven J. Renick, Manning, Marder & Wolfe, Los Angeles, California, for defendants-appellees David Conn and Carol Najera.

Scott D. MacLatchie and Priscilla F. Slocum, Franscell, Strickland, Roberts & Lawrence, Pasadena, California, for defendants-appellees Leslie Zoeller and Elliot Oppenheim.

OPINION

HAWKINS, Circuit Judge:

The prosecution and defense of criminal allegations produce ample opportunity for adversarial conflict. Without even looking for trouble, the interests of prosecution and defense can collide. This appeal demonstrates what can happen when one side steers those forces into direct and obvious conflict. Here, the prosecution's desire to gather evidence for the re-trial of a high-profile murder case runs directly into a defense attorney's right to consult with his client. The result is not a pretty picture. It is made all the worse because it appears to have been an entirely avoidable collision.

The case comes to us in the form of a civil rights damage action. Attorney Paul L. Gabbert ("Gabbert") wishes to pursue the action against two deputy district attorneys, a police officer, and a court-appointed special master. He alleges violations of his Fourth and Fourteenth

Amendment rights arising out of a search of his person and effects executed just moments before his client entered a grand jury room. The district court dismissed Gabbert's Fourth Amendment claim and granted summary judgment for the defendants on his Fourteenth Amendment claims. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We hold that Gabbert had a clearly established right to pursue his profession without undue and unreasonable governmental interference and that no reasonable prosecutor or police officer could have believed that the worst of this conduct was lawful. We also hold that a second search of Gabbert, which violated both state law and the face of the warrant, amounted to a warrantless and therefore unreasonable search.

I. FACTS

Gabbert represented Traci Baker ("Baker"), a defense witness in the first murder trial of Lyle and Erik Menendez.[1] After the close of evidence in that trial, Los Angeles County Deputy District Attorneys David Conn ("Conn") and Carol Najera ("Najera") learned that Lyle Menendez had written a letter to Baker in which he allegedly instructed her to testify falsely.

Armed with this information, Conn obtained a subpoena directing Baker to testify before a grand jury and produce any correspondence that she had received from Lyle Menendez. Beverly Hills Police Department Detective Leslie Zoeller ("Zoeller"), an investigating officer in the Menendez case, served that subpoena on Baker at Gabbert's law office.

---

[1]The events at issue in this appeal occurred during jury deliberations of the first Menendez trial, which ultimately resulted in two hung juries.

The next day, Gabbert sought to file a motion to quash that portion of the subpoena requiring Baker to produce correspondence from Menendez. A Los Angeles Superior Court Judge declined to accept Gabbert's motion for filing and also denied his application for an order shortening time for the hearing on the motion to quash.

At about this same time, Conn, Najera, and Zoeller obtained a warrant to search Baker's apartment for any Menendez correspondence. When presented with the warrant, Baker informed Detective Zoeller that she had given any correspondence from Lyle Menendez to Gabbert. Zoeller relayed this information to Conn and Najera.

Three days later, Gabbert accompanied Baker to her scheduled grand jury appearance. As Gabbert and Baker walked into the building where the appearance was to take place, Conn approached Gabbert and asked him if he had brought the "documents" with him. Conn was referring to the Menendez correspondence, but Gabbert thought Conn was referring to Gabbert's motion to quash and accompanying documents.

Based on Gabbert's response, Conn decided to obtain a warrant to search Gabbert and directed Detective Zoeller to secure it. Under California law, the search of an attorney or law office must be conducted by a court-appointed special master. In this instance, Elliot Oppenheim ("Oppenheim"), a retired lawyer, was authorized to search Gabbert and his effects.

As Baker and Gabbert were waiting outside the grand jury room, Zoeller, at Conn's direction, served Gabbert with the search warrant. At Gabbert's request, the search took place in a private room adjacent to the grand jury room. Before he was actually searched, Gabbert gave Oppenheim two photocopied pages of a three-page letter from Lyle Menendez to Baker, informing Oppenheim that this was the

only document on his person or in his effects that constituted correspondence between Menendez and Baker. Oppenheim proceeded to search Gabbert's files, including at least two files that clearly involved clients other than and unrelated to Baker. When Gabbert protested, Oppenheim proceeded to review the files anyway. Oppenheim also examined the contents of Gabbert's briefcase, including his calendar, wallet, dictaphone, eyeglass case, and notepad.

Within minutes of the search warrant was being executed on Gabbert, Najera, also acting at Conn's direction, called Baker before the grand jury and began to question her. In response to the first question, Baker asked to leave the grand jury room to consult with her attorney. Gabbert, of course, was being searched at this very moment.

Conn's secretary located Gabbert in the room where he was being searched and informed him that his client needed to speak with him. Gabbert, apparently unaware that his client was immediately outside the room, declined to leave. Instead he informed the secretary that the prosecution, which at least in his mind had created the problem, would have to simply delay questioning Baker further while the search was being carried out.

Baker then returned to the grand jury room and, reading off a card she had prepared in advance, asserted her Fifth Amendment privilege against self-incrimination on "the advice of counsel." In response to a second question from Najera, Baker again asked to speak with her attorney and left the room. Gabbert was nowhere to be seen. Baker waited in the hallway until a bailiff appeared, telling her to return to the grand jury room where she once again asserted her Fifth Amendment privilege.

Conn thereupon moved to hold Baker in contempt for failing to produce the documents subject to the subpoena, and the grand jury took a break. Conn, Najera, and Zoeller,

with Baker in tow, then joined Oppenheim and Gabbert in the room where Oppenheim had just searched Gabbert. Oppenheim informed Conn that Gabbert did not possess the materials subject to the search warrant, but that Gabbert's effects did not contain privileged matters. Gabbert disputed this statement and informed Conn that he had files of other clients as well as privileged matters concerning Baker (e.g., Gabbert's notes of his interview with Baker). Conn thereupon informed Gabbert that Detective Zoeller would conduct a follow-up search of Gabbert's person and effects. Gabbert neither consented to nor resisted this search which was carried out by Zoeller with Conn and Najera looking on. Oppenheim took no part in this second search.

II. PROCEDURAL HISTORY

Gabbert contends his Fourth Amendment right to be free from unreasonable searches and seizures and his Fourteenth Amendment right to practice his profession without unreasonable governmental interference were both violated. The district court dismissed his Fourth Amendment claims, finding that Zoeller and Oppenheim had absolute immunity and Conn and Najera had qualified immunity. The district court found that Zoeller, as a public officer executing a court order, had quasi-judicial immunity and that Oppenheim was immune from suit as a judicial officer performing a judicial function. The district court declined to give the deputy district attorneys absolute immunity because it found they were acting as investigators, not advocates, during the search and grand jury proceeding. Finally, the district court denied the defendants' motion to dismiss Gabbert's Fourteenth Amendment claims.

The district court denied Gabbert's motion for leave to amend his complaint to include a state law claim under

California Penal Code § 1524(c), the statute regulating the search of lawyers or law offices. The district court declined to exercise supplemental jurisdiction over a civil claim based on a violation of Cal.Penal Code § 1524, finding that it presented a novel question of state law which would substantially predominate over Gabbert's remaining Fourteenth Amendment claims.

The defendants moved for summary judgment on Gabbert's Fourteenth Amendment claims. The district court granted summary judgment for Conn and Najera based on qualified immunity and for Zoeller and Oppenheim based on absolute immunity.

III. STANDARD OF REVIEW

Both a dismissal for failure to state a claim and a grant of summary judgment on the basis of qualified immunity in a 42 U.S.C. § 1983 action are reviewed de novo. *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1043 (9th Cir.1996) (summary judgment); *Stone v. Travelers Corp.*, 58 F.3d 434, 436-37 (9th Cir.1995) (Fed. R. Civ. Proc.12(b)(6)); *Neely v. Feinstein*, 50 F.3d 1502, 1507 (9th Cir.1995) (qualified immunity in § 1983 action). These same authorities teach that we must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. This court reviews a denial of leave to amend a complaint for an abuse of discretion. *Maljack Prods. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 888 (9th Cir.1996).

IV. ANALYSIS

"To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right." *Wood v. Ostrander,* 879 F.2d 583, 587 (9th Cir.1989).

Absolute immunity, a total defense at the outset to a civil rights action, is afforded to those officials performing special functions that require independence and fearless performance. *See Burns v. Reed,* 500 U.S. 478, 484-85 (1991). An official seeking absolute immunity from a § 1983 action bears the burden of showing that such immunity is applied for the function at issue. *See id.* at 486. There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. *See id.* Absolute immunity is given sparingly. *See id.*

The qualified immunity doctrine protects government officials from civil liability under § 1983 "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Analysis of a qualified immunity claim involves three steps: (1) identifying the specific right allegedly violated; (2) determining whether the right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) determining whether a reasonable public officer could have believed that the particular conduct at issue was lawful. *See Newell v. Sauser,* 79 F.3d 115, 117 (9th Cir.1996); *Alexander v. City and County of San Francisco,* 29 F.3d 1355, 1363-64 (9th Cir.1994).

When the underlying facts are undisputed, the district court must decide whether a public officer is entitled to

qualified immunity "at the earliest possible point in the litigation." *Act Up!/Portland v. Bagley,* 988 F.2d 868, 873 (9th Cir.1993) (interpreting *Hunter v. Bryant,* 502 U.S. 224, 227-28 (1991)).

A. FOURTEENTH AMENDMENT CLAIM

1. Immunity of the Prosecutors

a. Absolute Immunity

Conn and Najera claim that absolute immunity protects them from liability for Gabbert's § 1983 claims. Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 431 (1976). The law affords absolute immunity to a prosecutor for performing the functions of a prosecutor, rather than simply for having the status of prosecutor. *See Buckley v. Fitzsimmons,* 509 U.S. 259, 273 (1993).

Prosecutors are entitled to absolute immunity for initiating and pursuing prosecution. *See Imbler,* 424 U.S. at 431. This immunity extends to prosecutorial conduct before grand juries. *See Burns,* 500 U.S. at 490 n. 6. Prosecutors are not protected by absolute immunity, however, when they act as investigators rather than as advocates. *See Buckley,* 509 U.S. at 273. A prosecutor performing functions generally performed by detectives or police officers loses entitlement to absolute immunity but is eligible for the qualified immunity usually accorded those actions. *See id.*

Gabbert claims Conn and Najera violated his constitutional rights by their timing of the service of the search warrant and directing the second search. The district court found that Conn and Najera acted as investigators, not

advocates, by participating or directing the pre-indictment gathering of evidence. The district court's determination in this regard is on solid ground, as the prosecutors here performed activities more associated with police functions: they served a search warrant upon Gabbert's client at her residence, directed a police officer to obtain a search warrant for Gabbert, were present when the police officer served the warrant to Gabbert, introduced Gabbert to the special master, informed Gabbert of the need for a second search, were present for the second search, and viewed Gabbert's documents during the search. Thus, the district court properly found that prosecutors Conn and Najera were not entitled to absolute immunity for their actions.

b. Qualified Immunity

Alternatively, Conn and Najera claim they are entitled to qualified immunity. The threshold question in resolving such a claim is whether the plaintiff has identified a specific right allegedly violated by government actors. *See Newell,* 79 F.3d at 117. "Due process violations must be particularized before they can be subjected to the clearly established test." *Id.* (quoting *Kelley v. Borg,* 60 F.3d 664, 667 (9th Cir.1995)); *Alexander v. County of Los Angeles,* 64 F.3d 1315, 1319 (9th Cir.1995). Gabbert's claim is specific: the Fourteenth Amendment protects his right to practice his profession without undue and unreasonable governmental interference.

The Fourteenth Amendment protects "the right of the individual ... to engage in any of the common occupations of life." *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972); *see Wedges/Ledges of California, Inc. v. City of Phoenix,* 24 F.3d 56, 65 n. 4 (9th Cir.1994) ("[P]ursuit of an occupation or profession is a protected liberty interest."). Such a right

is both a liberty and property right protected from state deprivation or undue interference. *See Keker v. Procunier,* 398 F.Supp. 756, 760 (E.D.Cal.1975) (citing *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923)); *see Greene v. McElroy,* 360 U.S. 474, 492 (1959) (right to hold specific private employment and to follow chosen profession free from unreasonable governmental interference protected by Fifth Amendment); *see also In re Griffiths,* 413 U.S. 717, 722-27 (1973) (state requirement of United States citizenship violates attorney's right to practice law). Because the Fourteenth Amendment protects an individual's right to practice a profession free from undue and unreasonable state interference, Gabbert has identified a specific right allegedly violated.[2]

Having identified the specific right at issue, we turn to whether that right was clearly established at the time the prosecutors allegedly interfered with that right. *See Anderson v. Creighton,* 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "If the controlling law is not clearly established, a reasonable person would not be expected to

---

[2]The prosecutors seek to characterize Gabbert's claim as one for lost professional opportunities or injury to his professional reputation. Injury to a professional reputation is not a liberty interest protected by the Fourteenth Amendment. *See Siegert v. Gilley,* 500 U.S. 226, 232 (1991); *Paul v. Davis,* 424 U.S. 693 (1976). Gabbert's claim is that the prosecutors' conduct directly interfered with his ability to practice his profession. Specifically, he contends that the prosecutors' conduct prevented him from freely rendering legal assistance to his client whenever she chose to seek his advice regarding her grand jury testimony. Thus, those cases failing to find a liberty interest in a loss of reputation are inapposite.

know how to structure his conduct in order to avoid liability." *Romero v. Kitsap County*, 931 F.2d 624, 628 (9th Cir.1991) (quoting *Todd v. United States*, 849 F.2d 365, 368-69 (9th Cir.1988)). The plaintiff bears the burden of showing that the right allegedly violated was clearly established. *See Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir.1996).

A right is clearly established "[i]f the only reasonable conclusion from binding authority [was] that the disputed right existed." *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir.1997). "The contours of the right must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir.1994) (quoting *Anderson*, 483 U.S. at 640). For a right to be clearly established, "the very action in question" need not "ha[ve] previously been held unlawful"; instead, the "unlawfulness must be apparent" in light of pre-existing law. *Anderson*, 483 U.S. at 640. "Thus, when the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza*, 27 F.3d at 1361 (quoting *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir.1993)); *see Backlund v. Barnhart*, 778 F.2d 1386, 1390 (9th Cir.1985) ("Certainly ... [§ 1983 plaintiffs] need not always produce binding precedent.... There may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation.").

The unusual facts of this case preclude "the very action in question" to be clearly established in our case law. Nevertheless, long-standing precedent establishes the

importance of the attorney-client relationship during a client's grand jury testimony. A witness has an absolute duty to answer all questions before a grand jury. *See United States v. Mandujano*, 425 U.S. 564, 581 (1976). This absolute duty is subject to limitation: the witness is "free at every stage to interpose his constitutional privilege against self-incrimination." *See id.* at 584. To assist the witness in asserting this privilege, a witness has the right to consult with her attorney outside the grand jury room. *Id.* at 581. This right to assistance is clearly established in this and other circuits. *United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir.1990) (witness has "a right to consult with an attorney waiting outside the grand jury room during the proceedings"); *United States v. Schwimmer*, 882 F.2d 22, 27 (2d Cir.1989) (same); *In re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir.1988) (same). The witness's clearly established right to assistance, however, cannot be exercised if government officials unnecessarily interfere with an attorney's ability to provide that advice.

A constitutional right may be clearly established "both by common sense and by precedent." *Newell*, 79 F.3d at 117. Both clearly establish that the right to practice a profession necessarily includes the right to practice according to the highest standards of that profession. There is no right more central to that notion than the right to maintain the privacy and freedom from intrusion essential to the attorney-client relationship. *See Damron v. Herzog*, 67 F.3d 211, 214 (9th Cir.1995); *DeMassa v. Nunez*, 770 F.2d 1505, 1506-07 (9th Cir.1985); *see also* Model Rules of Professional Conduct Rule 1.6. Common sense necessarily leads to the conclusion that an attorney has the right to practice his profession in privacy and freedom from unreasonable intrusion by "waiting outside the grand jury room" during his client's testimony. *Plache*, 913 F.2d at

1380. Therefore, we hold that Gabbert had the clearly established right to practice law free from undue and unreasonable governmental interference.

The final step in a qualified immunity analysis is whether a reasonable official could have believed the conduct at issue was lawful under that clearly established law. *See Mendoza*, 27 F.3d at 1362. A defendant must show that a reasonable officer could have believed that the conduct was lawful. *See Collins*, 110 F.3d at 1369. We decide whether the officials' actions were objectively reasonable under the facts and circumstances, without regard to their underlying intent or motivation. *See Graham v. Connor*, 490 U.S. 386, 397 (1989).

Here, two streams of events collided. The prosecutors were poised with a search warrant for Gabbert's effects to be carried out by a special master pursuant to California procedure. Baker, as required by her grand jury subpoena, was present and prepared to appear before the grand jury. The prosecutors were in control of both events: they controlled the timing of the execution of the search warrant on Gabbert and his client's grand jury appearance. The only apparent reason to have both occur at the same time was the prosecutors' desire to prevent Gabbert from communicating with his client.

There was a clear and obvious path that, if followed, would have allowed the prosecutors to both execute the search warrant as well as permit Baker to appear before the grand jury with Gabbert available for consultation. The prosecutors could have simply delayed Baker's grand jury appearance while the special master searched Gabbert and his files. Baker would have had no right to be present when Gabbert was searched and therefore could have been kept comfortably out of harm's way. Alternatively, the prosecutors could have delayed the search of Gabbert until

his client was finished testifying before the grand jury.

The prosecutors chose instead to pursue a path that put these two events into direct conflict, executing the search warrant on Gabbert at almost the exact time Baker was being haled into the grand jury room.[3] The plain and intended

---

[3]We have had occasion to describe the "model of government sensitivity to the special privacy interests that are implicated when a law firm's files must be searched" pursuant to a warrant. *See In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847, 858 (9th Cir.1991).

> From the time the warrants were requested, the officers took considerable care in minimizing the intrusion into the privacy of the Doe Four law firm. *The Government intentionally timed the search for a time of day when it would least disrupt the law firm's activities.* The Government also suggested to the issuing court that it impose any special restrictions on the execution of the warrants it deemed appropriate in light of the facts that the files in a law office would be searched.
>
> The execution of the warrants, likewise, shows considerable concern for the privacy interests of the law firm and its clients. *At the main office, the agents delayed the search while law firm attorneys negotiated with the United States Attorney as to the best way to meet the Government's need for these documents.* An agreement was reached that the officers would not conduct a search of the files. Instead, law firm personnel searched

result was to prevent Gabbert from consulting with Baker during her grand jury appearance.[4] These actions were not objectively reasonable, and thus the prosecutors are not protected by qualified immunity from answering Gabbert's Fourteenth Amendment claim.[5]

> the files and identified the relevant documents. These documents were sealed and turned over to the district court.
>
> At the satellite office, the officers seized the files bearing the names of the persons identified in the warrant, without reviewing the contents. These documents were sealed and delivered to the district court.
>
> As the result of these precautions, the privacy interests of the persons subject to the search were fully protected.

Id. (emphasis added). Although we do not prescribe a specific method for executing a search warrant on a lawyer or law office, we note that prosecutors Conn and Najera miserably failed to achieve the cooperative attitude exhibited in this model.

[4]The prosecutors' counsel conceded at oral argument that the only reason for the timing of the search was "to take advantage" of this situation.

[5]We are unpersuaded by the prosecutors' argument that their actions were objectively reasonable because they had no reason to know that Baker did not, in fact, consult with Gabbert when she left the grand jury room. It is true that, upon Baker's return to the grand jury room, she invoked her privilege against self-incrimination on "the advice of

Our holding does not provide a basis for a private attorney to resist legitimate criminal procedure and litigation devices--such as search warrants or discovery requests--in cases against the government. Nor does our holding transform every violation of a client's constitutional rights into a corresponding violation of an attorney's constitutional rights. Rather, our holding is narrow: a state government violates an attorney's Fourteenth Amendment rights when its officers unduly and unreasonably interfere with the attorney's right to practice his profession by preventing the attorney from offering legal assistance to the client in the very matter and at the very moment for which the lawyer was retained.

2. Immunity of the Detective

Detective Zoeller claims absolute immunity from Gabbert's § 1983 claim for violating his Fourteenth Amendment rights. Zoeller relies on *Coverdell v. Department of Social and Health Servs.*, 834 F.2d 758 (9th Cir.1987), for the proposition that a police officer has absolute quasi-judicial immunity from liability when executing a search warrant. We do not reach this issue because we find that Zoeller is protected by qualified immunity. *See Marks v. Clarke*, 102 F.3d 1012, 1024-25 (9th Cir.1997); *Ortiz v. Van Auken*, 887 F.2d 1366, 1370 (9th Cir.1989).

---

counsel." Baker's prepared statement, however, does not make the prosecutors' actions objectively reasonable. At best, the prosecutors had to know that Gabbert was distracted from giving his full attention and advice to Baker. This distraction prevented Gabbert from practicing his profession "according to the highest standards." *Keker*, 398 F.Supp. at 761.

As discussed above, Gabbert had a clearly established right to practice his profession free from undue and unreasonable governmental interference. Thus, our focus turns to whether a reasonable police officer could have believed this conduct was lawful.

We find Detective Zoeller's conduct objectively reasonable. The warrant at issue expressly stated that it could "be served at any time of the day or night." Zoeller served the warrant on Gabbert at the direction of Conn. Most importantly, Zoeller had no control over the timing of the prosecutors' calling Baker to the grand jury room. Therefore, Zoeller is entitled to qualified immunity from Gabbert's Fourteenth Amendment claim.

3. Immunity of the Special Master

Special Master Oppenheim also claims absolute quasi-judicial immunity. Judicial immunity may be extended to officials other than judges when "their judgments are functionally comparable to those of judges--that is, because they, too, exercise a discretionary judgment as part of their function." *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993). We have extended absolute quasi-judicial immunity to special masters. *See Atkinson-Baker & Assocs., Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir.1993) (noting that a special master "clearly exercise[s] discretionary judgment as part of his function").

Oppenheim exercised discretionary judgment as part of his function. California Penal Code § 1524(c)(1) expressly calls upon the "judgment of the special master." Moreover, § 1524 requires the special master to assess the relevance of any items he examines and to determine whether the party served complied with the warrant. These "discretionary judgments" are functionally comparable to

those a judge would make in the absence of a special master. *Antoine*, 508 U.S. at 436. Oppenheim therefore is entitled to absolute quasi-judicial immunity.[6]

B. FOURTH AMENDMENT CLAIM

1. Immunity of the Prosecutors

Gabbert claims that deputy district attorneys Conn and Najera violated his Fourth Amendment right to be free from unreasonable searches when they engaged in an impermissible second search of his person and possessions without a valid warrant and failed to comply with California Penal Code § 1524.

For the reasons stated above, we reject the prosecutors' claim to absolute immunity. We must determine whether the prosecutors are entitled to qualified immunity.

Searches of attorneys and their offices, of course, are ripe with potential for controversy. Conducted without restraint, legitimate privileges and privacy expectations, including those of uninvolved third parties, can be violated. For this and other sensible policy reasons, California law wisely requires that such searches be carried out by special masters and that disputes over what may or may not be seized be taken promptly before a trial judge for resolution.

---

[6]Although the law affords absolute immunity to Special Master Oppenheim, it should be noted that he violated several provisions of the California statute regulating the execution of a search of an attorney. *See* Cal.Penal Code § 1524. Additionally, his decision that Gabbert's files contained no privileged material because the documents were not stamped or marked "privileged" is contrary to even the most basic understanding of the attorney-client privilege.

Cal.Penal Code § 1524; *see People v. Superior Court,* 37 Cal.App.4th 1757, 44 Cal.Rptr.2d 734 (1995); *Geilim v. Superior Court,* 234 Cal.App.3d 166, 285 Cal.Rptr. 602 (1991).

We cannot accept, however, Gabbert's claim that the prosecutors' alleged violation of Cal.Penal Code § 1524 is actionable under 42 U.S.C. § 1983. State law cannot form the basis of a § 1983 claim unless the violation of that law also results in a constitutional or federal law violation. *See Vargas-Badillo v. Diaz-Torres,* 114 F.3d 3, 6 (1st Cir.1997); *Long v. Norris,* 929 F.2d 1111, 1114 (6th Cir.1991); *Barry v. Fowler,* 902 F.2d 770, 772 (9th Cir.1990). Therefore, the district court properly rejected Gabbert's § 1983 claim based on a violation of state law.

Gabbert also alleges, however, that the prosecutors violated his Fourth Amendment rights by searching or participating in a search of his personal effects without a valid or lawful warrant.

We agree with the district court that the search warrant authorizing Special Master Oppenheim to search Gabbert was valid. *See United States v. Cannon,* 29 F.3d 472, 478 (9th Cir.1994) (warrant is valid if issuing judge had substantial basis to conclude affidavit establishes probable cause); *Forster v. County of Santa Barbara,* 896 F.2d 1146, 1148 (9th Cir.1990) (§ 1983 defendant entitled to qualified immunity even if the affidavit contained intentionally or recklessly false statements if the affidavit contained sufficient content to support probable cause). We disagree with the district court that the valid search warrant authorized the prosecutors to direct the second search of Gabbert.

Although a state law violation is not actionable in a § 1983 claim, federal courts must necessarily consider the lawfulness of a search under state law. *See Pierce v. Multnomah County, Or.,* 76 F.3d 1032, 1038 (9th Cir.)

(state law determines reasonableness of arrest in § 1983 claim), *cert. denied,* 117 S.Ct. 506 (1996); *United States v. Mota,* 982 F.2d 1384, 1387 (9th Cir.1993) (reasonableness of arrest determined by referring to state law in a criminal case); *United States v. Wanless,* 882 F.2d 1459, 1464 (9th Cir.1989) (federal law may require searches and seizures be conducted in accordance with state law). Also, "a violation of state ... law can serve as the basis of a section 1983 action '[w]here the violation of state law causes the deprivation of rights protected by the Constitution.' " *Draper v. Coombs,* 792 F.2d 915, 921 (9th Cir.1986) (quoting *Wirth v. Surles,* 562 F.2d 319, 322 (4th Cir.1977)). Therefore, we will look to Cal.Penal Code § 1524 and the face of the warrant to determine whether the search warrant authorized the second search of Gabbert.

The California law governing the search of attorneys for documentary evidence permits only the special master to conduct the search. Cal.Penal Code § 1524(e). The statute forbids the party seeking or serving the warrant from participating in the search except upon the agreement of the party being searched. *See id.* The prosecutors knew of the statute's requirements and thus directed Detective Zoeller to obtain a search warrant pursuant to that statute. The search warrant stated that Detective Zoeller would search Gabbert "through Special Master Elliot Oppenheim." Neither California law nor the face of the search warrant authorized the prosecutors to participate in the second search of Gabbert without his consent. Thus, the second search was warrantless.

The prosecutors argue that the second search was not warrantless because it was a continuation of the first search under a valid warrant. It is true that courts have allowed second searches under the same warrant, as long as the subsequent search could be considered a continuation of the

first search. *See United States v. Kaplan,* 895 F.2d 618, 623 (9th Cir.1990); *United States v. Carter,* 854 F.2d 1102, 1107 (8th Cir.1988). In both those cases, however, the same officer conducted the first search and returned shortly to retrieve items listed in the search warrant. *See Kaplan,* 895 F.2d at 623; *Carter,* 854 F.2d at 1105. California law makes clear that only the special master may execute a search of this type. Here, Detective Zoeller conducted the second search at the direction of the prosecutors. Nor did Gabbert consent to the second search by someone other than the special master. A search conducted in such flagrant disregard of statutory norms and the plain requirements of the warrant itself cannot be a continuation of the first search and thus becomes an impermissible general search. *See United States v. Mittelman,* 999 F.2d 440, 442-43 (9th Cir.1993).

Qualified immunity from civil liability can extend to officials who perform unlawful warrantless searches. *See Barlow v. Ground,* 943 F.2d 1132, 1139 (9th Cir.1991). The right to be free from warrantless searches absent an applicable exception to the warrant requirement is clearly established. *See California v. Acevedo,* 500 U.S. 565, 569 (1991); *United States v. Rambo,* 74 F.3d 948, 953 (9th Cir.), *cert. denied,* 117 S.Ct. 72 (1996). Thus, "[t]he relevant inquiry is whether a reasonable government official could have believed his conduct was lawful, in light of clearly established law and the information he possessed." *Thorsted v. Kelly,* 858 F.2d 571, 573 (9th Cir.1988).

Conn was clearly aware that California law permitted only a special master to search Gabbert. He directed Detective Zoeller to add to the existing affidavit and to secure a search warrant for Gabbert's person and effects. Both the affidavit and the search warrant stated that the search would be conducted by Special Master Oppenheim

pursuant to § 1524. In viewing the evidence in the light most favorable to the non-moving party, *see Bagdadi v. Nazar,* 84 F.3d 1194, 1197 (9th Cir.1996), the record shows that Conn directed Zoeller to search Gabbert after the initial search by the special master. Conn stood close by as Detective Zoeller conducted this warrantless second search. Conn's conduct was therefore not objectively reasonable, and he is not entitled to qualified immunity from Gabbert's Fourth Amendment claim.

Although a reasonable prosecutor in Najera's position might also know that the second search was unlawful, the evidence does not show that she was sufficiently involved in the second search to be liable under § 1983. She neither directed the detective to obtain the search warrant nor instructed him to conduct the warrantless second search. Her mere presence during the second search does not arise to a violation of either federal or state law. We therefore affirm the district court's dismissal of Gabbert's Fourth Amendment claim against Najera.

2. Immunity of the Detective

Gabbert asserts similar Fourth Amendment violations against Detective Zoeller. A police officer does not enjoy absolute immunity from suit for conducting a search but may be protected by qualified immunity. *See Liston v. County of Riverside,* 120 F.3d 965, 975 (9th Cir.1997). We conclude, for the reasons stated above, that the second search of Gabbert conducted by Detective Zoeller was not authorized by the existing warrant and that Gabbert had a clearly established right to be free from warrantless searches.

The evidence compels the conclusion that a reasonable officer in Zoeller's situation could not have believed that his conduct was lawful. In his affidavit, Zoeller requested the

appointment of a special master pursuant to § 1524 "to assist in the search of Mr. Gabbert's documents." He stated that this fulfilled the requirements of the statute. The search warrant issued by the magistrate authorized the special master, not Zoeller, to conduct the search. Clearly, Zoeller knew of the existence of § 1524 and its special master requirement. A reasonable officer would know, not only the existence of the law, but also its general requirements. Detective Zoeller cannot escape liability from Gabbert's claim by asserting ignorance of the substance of the governing law. Therefore, a reasonable detective would know, from the applicable law and from the face of the search warrant, that he was not authorized to search Gabbert. We conclude that Zoeller does not have qualified immunity from Gabbert's Fourth Amendment claim.

3. Immunity of the Special Master

Gabbert claims that Special Master Oppenheim violated his Fourth Amendment rights by conducting an overbroad search. Oppenheim enjoys absolute immunity for all activities performed pursuant to his role as special master. *See Atkinson-Baker & Assocs.*, 7 F.3d at 1454-55. Although we are mystified by Oppenheim's apparent disregard for the plain requirements of Cal.Penal Code § 1524, he was in fact acting pursuant to a warrant and at least generally doing those things authorized by it. Moreover, the things he searched were those that might have legitimately contained the correspondence specified in the warrant. *See United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir.1987). We therefore affirm the district court's dismissal of this claim against Oppenheim.

C. SUPPLEMENTAL JURISDICTION OF THE DISTRICT COURT

Because the district court's denial of Gabbert's motion for leave to amend his complaint to include a cause of action under Cal.Penal Code § 1524 was based, in part, on its dismissal of Gabbert's Fourth Amendment claims, we assume, without deciding the issue, that the district court will want to revisit this ruling.

V. CONCLUSION

In the procedural posture this case comes to us, we are necessarily limited. Only the fullness of discovery and perhaps a trial on the merits can fully explore Gabbert's claims and the defendants' defenses. Defendants may be able to establish that, whatever they did, it did not materially affect Gabbert's rights. We can only say that Gabbert's claims merit full exposition and defendants' defenses complete exploration.

The order granting summary judgment to prosecutors Conn and Najera on Gabbert's Fourteenth Amendment claims is REVERSED. The order granting summary judgment to Detective Zoeller and Special Master Oppenheim on Gabbert's Fourteenth Amendment claims is AFFIRMED. The dismissal of Gabbert's Fourth Amendment claims against Conn and Zoeller is REVERSED. The dismissal of Gabbert's Fourth Amendment claims against Najera and Oppenheim is AFFIRMED.

The case is remanded to the district court for further proceedings in accordance with this opinion. Each party to bear its own costs. The panel retains jurisdiction over further appeals of this matter.

FILED
SEP 30 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

THIS CONSITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert,	)	CASE NO. CV 94-
	)	4227-RSWL (Ex)
Plaintiff,	)	
	)	
vs.	)	**ORDER**
	)	
David Conn, Carol Najera,	)	
Elliot Oppenheim, Leslie	)	
Zoeller and Does 1 through X	)	
	)	
Defendants.	)	
	)	

Two of the defendants in the above-captioned action, David Conn and Carol Najera, have moved to dismiss Plaintiff Paul L. Gabbert's 42 U.S.C. § 1983 suit. Defendants Conn and Najera base their Fed. R. Civ. P. 12(b)(6) motion to dismiss on, alternatively: absolute immunity; qualified immunity; and lack of causation. The matter was set for oral argument on September 19, 1994, but

was removed from the Court's law and motions calendar pursuant to Fed. R. Civ. P. 78, for disposition based on the papers filed.

Now, having carefully considered all of the papers filed in support of and in opposition to the motion, the Court hereby **GRANTS** in part and **DENIES** in part Defendants' Motion to Dismiss.

I. BACKGROUND

Plaintiff Gabbert is counsel for Tracy Baker, a witness in the recent Menendez brothers murder trial. In March of 1994, Baker was being investigated by the Los Angeles District Attorney's office for perjury during the Menendez trial. Baker was called to testify before a grand jury on this issue.

At the Beverly Hills courthouse on March 21, 1994, as Plaintiff escorted his client to the grand jury hearing, Plaintiff was served with a search warrant by Detective Leslie Zoeller.[1] While Baker testified before the grand jury, Plaintiff's person, briefcase, and accordion file were searched by Special Master Elliott. Oppenheim.[2] Immediately after Oppenheim's search of Plaintiff, Plaintiff was searched again by Detective Zoeller. District attorneys David Conn and

---

[1] Leslie Zoeller is another defendant in this action but is not a party to this motion to dismiss.

[2] Oppenheim conducted the first search as a "special master" pursuant to Cal. Penal Code § 1524(c)(1) which requires the appointment of a special master when a search warrant is issued for documentary evidence in the possession of a lawyer. Oppenheim is another defendant in this action, but is not a party to this motion to dismiss.

Carol Najera, the moving parties in this motion, were present during this second search of Plaintiff.

Plaintiff alleges that the search warrant was obtained illegally, that the material searched was protected by the attorney-client privilege, and that the search went beyond the scope of the warrant. Plaintiff has filed suit under 42 U.S.C. § 1983,[3] claiming constitutional violations including the sixth amendment right to counsel, fourth amendment, and substantive due process violations.

II. DISCUSSION

A. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6).

In a Rule 12(b)(6) motion to dismiss, the Court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987); United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981). A court need not, however, accept conclusory allegations or unreasonable inferences at

---

[3] 42 U.S.C. § 1983 provides that
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

face value. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.), cert. denied 454 U.S. 1031, 102 S.Ct. 567 (1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (9th Cir. 1986).

In deciding on a Rule 12(b)(6) motion to dismiss, the court generally may not consider material beyond the pleadings. Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). However, material which is properly submitted as part of the complaint may be considered, and documents those whose contents are alleged in a complaint, and whose authenticity is not questioned may also be considered, even if the material is not physically attached to the complaint. Id. at 454.

B. Defendants Conn and Najer's First Ground for Dismissal: Absolute Immunity as Prosecutors.

Defendants first move that Plaintiff's § 1983 suit be dismissed against them on the grounds that, as prosecutors, they have absolute immunity from suit under § 1983.

The government official seeking absolute immunity bears the burden of showing that such immunity is justified for the action at issue. Burns v. Reed, -- U.S. --, 111 S.Ct. 1934, 1939 (1991). There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. Id. Absolute immunity is given sparingly. Id.

Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." Imbler v. Pachtman, 424 U.S. 411, 431, 96 S.Ct. 984, 995 (1976). In

determining a prosecutor's immunity, the court looks at the function performed by the prosecutor, rather than the prosecutor's status as prosecutor.

Prosecutorial activities in initiating and pursuing prosecution are "functions to which the reasons for absolute immunity apply with full force," and prosecutors are entitled to absolute immunity when performing those functions. Id. However, prosecutors are not protected by absolute immunity when they act as police investigators rather than as advocates preparing for trial. Buckley v. Fitzsimmons, -- U.S. --, 113 S.Ct. 2606, 2616 (1993). In other words, when a prosecutor performs functions generally performed by detectives or police officers, he receives the immunity usually accorded those actions -- i.e., qualified, not absolute immunity.

In order for Defendants to prevail on their claim for absolute immunity, they must show that they were functioning as advocates rather than as investigators. The Buckley Court found that a prosecutor cannot be acting as an advocate unless, as a threshold question, he has probable cause to initiate judicial proceedings. Even after a determination of probable cause, the prosecutor who engages in police investigative work receives only qualified immunity. 113 S.Ct. at 2616 & n.5. The question is not whether the conduct is related to the decision of whether to prosecute, but "whether the prosecutor's actions are closely associated with the judicial process." Burns, 111 S.Ct. at 1944.

Plaintiff argues that Defendants acted as police investigators, rather than advocates, because the "single purpose of the defendants' conduct was to gather evidence." Opp. at 12. Defendants' purpose, however, is not the issue here, in that it is possible for prosecutors to be granted absolute immunity for investigative functions which are connected to their role as advocates. Imbler, 424 U.S. at

432, 96 S.Ct. at 995 n.33 (noting that the prosecutor's role as advocate involves conduct preliminary to the initiation of prosecution, including other actions outside the courtroom).

Rather, the issue is Defendants' function during those investigations. Preparation for actions undertaken as an advocate may require investigative and administrative conduct which is shielded as connected to the prosecutor's role as advocate. Id. As the Supreme Court has stated, "Drawing a proper line between these functions may present difficult questions." Id. Similarly, Plaintiff's assertion that Defendants were engaging in "quintessentially investigative conduct" begs the question of what role Defendants acted in while they were engaging in that conduct.

Plaintiff alleges that Defendants' Conn and Najera delayed Plaintiff at the courthouse under the pretext of supplying Plaintiff with a letter granting his client immunity, until Plaintiff was served with the search warrant. Plaintiff further alleges that Conn and Najera were present when Plaintiff was served with the search warrant, and that Conn introduced Plaintiff to Special Master Oppenheim, who conducted the first search. Lastly, Plaintiff alleges that Conn and Najera were present for the second search and viewed Plaintiff's documents during the search, after Conn informed Plaintiff that Special Master Oppenheim had determined nothing in the briefcase and files was privileged.

Taking all of the above allegations as true, and making all inferences in favor of the non-moving party as is required on a 12(b)(6) motion, the Court finds that the conduct of Defendants Conn and Najera constitutes participation in the investigations. Further, the Court finds that these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions. For those

reasons, the Court **DENIES** Defendants Conn and Najera's claim to absolute immunity.

C. Defendants' Second Claim: Qualified Immunity as Government Officials.

Alternatively, Defendants Conn and Najera move for dismissal of Plaintiff's § 1983 action on the basis of their qualified immunity as government officials. Qualified immunity shields government officials from suit for damages when they perform discretionary functions, and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). The Ninth Circuit has set out a three prong inquiry for determining qualified immunity: identification of the specific right allegedly violated; determining whether it was so "clearly established" as to alert reasonable officers; and determining the ultimate issue of whether a reasonable officer could have believed the particular conduct was lawful. Romero v. Kitsap County, 931 F.2d 624, 627 (9th Cir. 1991). Because this immunity is an immunity from suit, rather than merely a defense to liability, the Supreme Court has stressed the importance of resolving immunity questions as early as possible in litigation. Hunter v. Bryant, -- U.S. --, 112 S.Ct. 534 (1991).

1. Plaintiff's Conduct Was Discretionary.

In general, only discretionary conduct by government officials is entitled to qualified immunity. Harlow, 457 U.S. at 816, 102 S.Ct. at 2737. Plaintiff contends that Defendants are not entitled to qualified immunity because their conduct in searching him was not discretionary. He contends that the Defendants' alleged supervision and participation in the

search of Plaintiff as conduct governed by Cal. Penal Code § 1524(c)(2), which provides for special procedures when a search warrant is issued for documentary evidence in possession of an attorney. Plaintiff argues that, because Cal. Penal Code § 1524 is mandatory, Defendants' conduct was ministerial rather than discretionary and thus outside the scope of behavior protected by qualified immunity.

In order for Plaintiff to state a claim under 42 U.S.C. § 1983, Plaintiff must plead a violation of constitutional or federal law. Plaintiff contends this alleged violation of the state statute resulted in the deprivation of his constitutional rights. However, Plaintiff does not specify the constitutional deprivations to which the alleged violation of Cal. Penal Code § 1524 gives rise.

State law cannot be the basis for a § 1983 claim, unless the violation of the state law also results in a constitutional or federal law violation. Long v. Norris, 929 F.2d 1111, 1115 (6th Cir. 1991) noting that "although Tennessee prison regulations may create a constitutional entitlement under the due process clause of the fourteenth amendment, they cannot change the standard of analysis for constitutional issues arising under the fourth amendment.") Thus, Plaintiff's argument that Defendants have no qualified immunity on the grounds that they acted ministerially does not succeed, because he fails to state a § 1983 claim on that basis. The Court finds that Defendants' conduct was discretionary.

2. Whether Defendants Violated Clearly Established Law.

The real issue in determining whether Defendants should be entitled to qualified immunity is whether the law governing their conduct was clearly established so that a reasonable officer would have known the conduct was

unlawful. Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. The threshold determination of whether the governing law was clearly established is a matter of law for the court to decide. Act Up!/Portland v. Bagley, 998 F.2d 868, 873 (9th Cir. 1993) (citing Harlow, 457 U.S. at 818, 102 S.Ct. at 2738). However, where material issues of fact are in dispute, the case must proceed to trial. Id. at 873.

a. Whether Defendants Were the Cause of the Alleged Deprivations.

Plaintiff alleges numerous constitutional violations. The first issue to be determined, however, is whether Defendants were sufficiently involved in the alleged unconstitutional conduct to be liable under § 1983. Essentially, Plaintiff alleges that Defendants proximately caused the alleged constitutional violations in two ways: a) they directed or supervised others in the unconstitutional behavior; and b) they directly participated in the second search.

i. Vicarious Liability Not a Basis for a § 1983 Claim.

Vicarious liability is not a basis for a § 1983 claim. Monell v. Dept. of Soc. Serv., 436 U.S. 658, 692, 98 S.Ct. 2018, 2036-37 (1978). However, supervision or direct participation in the unlawful conduct is a basis for liability under § 1983. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.1989).

ii. Causation Must Be Proximate.

Section 1983 further requires that a defendant's supervision or participation in the allegedly unconstitutional

conduct must be the proximate cause of the deprivation. Arnold v. Intern. Business Machines, 637 F.2d 1350, 1355 (9th Cir. 1981).

Defendants contend that Plaintiff has failed to allege any direct participation or supervision on the part of Defendants Conn and Najera. They further contend that Plaintiff fails to show that any supervision or participation by Defendants caused the alleged deprivation of Plaintiff's constitutional rights.

Plaintiff's complaint alleges that Conn directed the search of Plaintiff at the courthouse on March 21, 1994 by Special Master Oppenheim, as well as the search by Detective Zoeller, and states that Najera and Conn were not only present at the search but also "viewed" documents which were searched. It seems clear that Plaintiff's allegations, taken as true, do state facts showing direction and participation by Defendants. Moreover, it is apparent that such direction and constitutional deprivations which Plaintiff alleges. Defendants' lack of causation defense thus fails.

b. Alleged Constitutional Violations.

Plaintiff alleges a number of constitutional deprivations caused by Defendants, including substantive due process, fourth amendment, six amendment, and fourteenth amendment deprivations.

i. Fourth Amendment Violations.

a. Invalid Warrant.

Plaintiff alleges that Defendants Conn and Najera deprived him of his fourth amendment right, as incorporated

through the fourteenth amendment, to be secure from unreasonable searches by conducting a search under an invalid warrant. The warrant is invalid, Plaintiff alleges, because it contains two material misstatements of fact made with the knowledge they were false. Under Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684-85 (1978), allegations of deliberate misstatements made by the affiant to a warrant entitle the defendant to an evidentiary hearing on the validity of the warrant. The Franks standard also defines the scope of qualified immunity in civil rights actions. Branch v. Tunnell, 937 F.2d 1382, 1387 (9th Cir. 1991) (Branch I) (citing Rivera v. United States, 928 F.2d 592, 604 (2d. Cir. 1991)). However, Plaintiff does not allege that the actual affiant, Detective Zoeller, made the statements with the knowledge of their falsity, or with reckless disregard of the truth, as Franks requires. 438 U.S. at 171, 98 S.Ct. at 2684.

Additionally, Defendants respond that, even if the false statements were made intentionally or in reckless disregard of the truth, there is sufficient other material in the affidavit to support a finding of probable cause, which under Franks excuses the inaccuracies. Id. at 171-72, 98 S.Ct. at 2684. Defendants poit to the affidavit as containing a statement from Plaintiff's client that the primary object of the search warrant, the alleged letter, had been turned over to Plaintiff.[4] The affidavit states that Tracy Baker, Plaintiff's client, had informed the affiant that she had turned over the Menendez correspondence to her attorney, Plaintiff. This

[4] The affidavit and search warrant were attached to Plaintiff's complaint. Material such as subpoenas and search warrants as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994) (Branch II).

statement would be enough to support the issuing of the search warrant against Plaintiff Gabbert, even without the allegedly false statements.

Thus, the warrant is valid under either of Plaintiff's arguments, and the search conducted pursuant to it is likewise valid. The search was not clearly unlawful on the grounds of an invalid warrant, and under Harlow, Conn and Najera are entitled to qualified immunity on the charge that the search under the allegedly invalid warrant violated Plaintiff's fourth amendment rights.

b. Impermissibly Broad Execution of Warrant.

Secondly, Plaintiff alleges that Oppenheim's first search violated the fourth amendment because the searech went beyond the scope of the warrant.[5] He further alleges that the second search was invalid because it was "repretitive."

The warrant authorized a search of Plaintiff for "any and all correspondence between Tracy Baker and Lyle Menendez." (Complaint, Ex. C.). Plaintiff alleges that Oppenheim's search of Plaintiff's eyeglass case, memorandum calendar, and wallet/pocketbook went beyond the scope of the warrant because such correspondence would not reasonably be expected to be within those objects.

Police may search all items which legitimately might contain the objects specified in the warrant. United States v. Grandstaff, 813 F.2d 1353, (9th Cir. 1987); United States v. Disla, 805 F.2d 1340, 1347 (9th Cir. 1986). The warrant

[5] The following discussion of Oppenheim's search assumes, without determining, that Defendants Conn and Najera directed that search and thus were a cause of the alleged constitutional deprivation.

in question was for "correspondence." By definition, correspondence may include lettes and notes on small pieces of paper. Such small pieces of paper might have been placed within Plaintiff's eyeglass case, wallet, or calendar. The search of Plaintiff therefore did not go beyond the scope of the warrant and thus was not a violation of the fourth amendment on those grounds. On these grounds, Plaintiff cannot show that the search was clearly unlawful so as to overcome Defendants' claim to qualified immunity under Harlow.

Plaintiff further alleges that the second search of his personal effects was unauthorized by the warrant because it was "repetitive" and thus violated his rights under the fourth amendment. Plaintiff cites no case law to support his proposition that such searches are unreasonable. On the contrary, courts have allowed "second" searches under the same warrant, as long as the subsequent search could be considered a continuation of the first search. United States v. Kaplan, 895 F.2d 618, 623 (9th CIr. 1990) (holding that officer who visited defendant's offices to obtain specific files was allowed to return several hours later; second entry was considered continuation of the search); United States v. Carter, 854 F.2d 1102, 1107 (8th Cir. 1988) (officer's return to a motel room, several hours after a search, was valid because the authority of the search warrant had not expired.)

The second search conducted by Zoeller on Plaintiff occurred soon after the first search conducted by Oppenheim, and thus would be considered a continuation of Oppenheim's search under Kaplan. In any event, the second search was not clearly unlawful so that a reasonable officer should have known it was illegal. The second search, like the first search, therefore does not meet the Harlow test for overcoming qualified immunity.

c. Violation of Cal. Penal Code § 1524

Plaintiff alleges that the search was unconstitutional on a third ground, because it was allegedly conducted in violation of Cal. Penal Code § 1524, as discussed above in section II.C.1. Again, a § 1983 claim must be premised on the violation of federal law or constitutional provision. Long v. Norris, 929 F.2d at 1114. The violation of Cal. Penal Code § 1524 in and of itself does not constitute a fourth amendment violation, nor does Plaintiff clearly allege that his substantive due process rights were violated by the alleged violation of the state statute. Officials sued for constitutional violations do not lose their qualified immunity in § 1983 actions merely because their conduct violates some state statutory or administrative provision. Davis v. Scherer, 468 U.S. 183, 194, 104 S.Ct. 3012, 3019 & n.12 (1984). The violating conduct must violate clearly established federal law. Elder v. Holloway, -- U.S. --, 114 S.Ct. 1019, 1023 (1994) (unanimous decision).

Even if Plaintiff alleged that Defendants' failure to follow the procedural requirements of Cal. Penal Code § 1524 constituted a fourteenth amendment deprivation, his claim would fail. While state law may create a property interest protected by the fourteenth amendment, a substantive property right cannot exist exclusively by virtue of a procedural right. Dorr v. County of Butte, 795 F.2d 875, 876, 877 (9th Cir. 1986).

ii. Intrusion into Client Relationships as a Sixth Amendment Violation

Plaintiff alleges that Defendants, by causing the search warrant to be served upon him and participating in the

search, rendered him incommunicado from his client who was simultaneously testifying before the grand jury, thereby violating his client's sixth amendment right to effective counsel.

a. Plaintiff's Standing to Raise His Client's Sixth Amendment Claim

Plaintiff has standing to assert his client Baker's sixth amendment claim[6] under Wounded Knee Legal Defense/ Offense Com. v. FBI, 507 F.2d 1281, 1284 (8th Cir. 1974) ("[A] lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."); Keker v. Procunier, 398 F.Supp. 756, 765 (E.D. Cal. 1975) (counsel forced to meet their imprisoned clients in poor conditions had standing to raise their clients' sixth amendment claims).

b. Interference with Attorney-Client Relationship and Prevention of Effective Counsel as a Sixth Amendment Violation

[6] The record does not state whether or not Baker is actually a defendant in a criminal proceeding, although it appears that she was the object of a grand jury investigation. A violation of the attorney-client privilege implicates the sixth amendment only when it applies to the relationship between a criminal defendant and his attorney. Partington v. Gedan, 961 F.2d 852, 863 (9th Cir. 1992).

The question here is whether, for purposes of the Harlow test for qualified immunity, the law governing Defendants' behavior in searching Plaintiff and arguably interfering with his client's sixth amendment right to counsel was clearly established.

Plaintiff alleges that the serving of the search warrant upon him just as his client was called to testify in front of the grand jury was an interference with his client's sixth amendment right to effective assistance of counsel. Because of the serving of the search warrant and Oppenheim's subsequent search of Plaintiff, Plaintiff claims that his client was prevented from consulting with him immediately before and during her grand jury testimony. Plaintiff argues that this constitutes a violation of the Sixth Amendment.

Leaving aside the causation question of whether Defendants Conn and Najera were actually involved in timing the service of the search warrant to interfere with Plaintiff's representation of his client, the issue is whether such alleged interference is a violation of Baker's sixth amendment right to effective counsel. Government interference with the attorney-client relationship will constitute a violation of the sixth amendment only if the interference substantially prejudices the defendant. United States v. Irwin, 612 F.2d 1182, 1186-1187 (9th Cir. 1980); see United States v. Glover, 596 F.2d 857, 863-64 (9th Cir. 1979). Plaintiff makes no allegation that his client was substantially prejudiced by his unavailability. For that reason, the law is not clearly established that Defendants' alleged interference[7] with Plaintiff's representation of his client was unlawful.

[7] Again, the Court assumes without determining that causation exists, even though Defendants Conn and Najera's causation of the alleged interference is far from clear.

Under Harlow, Defendants Conn and Najera are thus entitled to qualified immunity on this issue.

c. Defendant's Contact of Plaintiff's Client as a Violation of Sixth Amendment

Plaintiff further alleges that Defendants Conn and Najera violated his client's sixth amendment rights by questioning her during a search of her home on March 18, 1994, despite knowing that she was represented by counsel, in violation of Cal. Prof. R. Conduct 2-100 (West Supp. 1994). Cal. Prof. R. Conduct 2-100 (A) provides that:

> While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

The rule has been found to apply to prosecutors pursuing a criminal case. United States v. Lopez, 4 F.3d 1455, 1459 (9th Cir. 1993). However, while Defendants Conn and Najera are bound by this rule and allegedly may have violated it, Plaintiff does not allege that this violation "substantially prejudiced" his client so that, under United States v. Irwin, his client's sixth amendment rights have been violated. Further, as discussed above, violations of state law do not provide a claim under § 1983 unless the violations in some way implicate a violation of constitutional rights.

d. Invasion of Attorney-Client Privilege.

Plaintiff alleges that the search of his briefcase and files invaded the attorney-client privilege because privileged

documents were viewed during the searches, and that his clients' sixth amendment rights were violated as a result. Plaintiff's allegations again fail to state a clearly established constitutional violation.[8] "[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." Partington v. Gedan, 961 F.2d 852, 863 (9th Cir. 1992) (quoting Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985)). Unless the interference with the attorney-client privilege substantially prejudices the defendant, an intrusion on the confidential relationship between a defendant and his attorney does not constitute a sixth amendment violation. Partington, 961 F.2d at 863; Clutchette, 770 F.2d at 1471 (citing United States v. Irwin.)

Thus, case law does not establish that Defendants' conduct was clearly a violation of the sixth amendment. Again, Plaintiff fails to allege that his client was substantially prejudiced by Defendants' alleged interference with the attorney-client privilege. Thus, under Harlow, Defendants have a qualified immunity to Plaintiff's claim.

iii. Plaintiff's Fourteenth Amendment Right to Practice His Profession.

Plaintiff alleges that Defendants' conduct interfered with his fourteenth amendment interest in practicing his

---

[8] Plaintiff alleges that not only Baker's files but other clients' files were viewed during this search. Plaintiff's clients whose files were viewed may have a privacy interest in the files, but Plaintiff does not have standing to raise his clients' fourth amendment claims. DeMassa v. Nunez, 770 F.2d 1505, 1506, 1507 (9th Cir. 1985).

profession. Such a right has been found to exist. Keker v. Procunier, 398 at 756; see Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). At least one district court has found that prison officials impermissibly interfered with attorneys' fourteenth amendment rights when attorneys were forced to meet their clients in an overly warm interview room in which glass partitions hampered attorneys' ability to consult with their clients. Kecker, 398 F.Supp. at 761.

To show that a right allegedly violated is "clearly established by law" under the Harlow test.,

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 3039 (1987) (citations omitted).

Defendants' alleged plan to serve the search warrant upon Plaintiff as his client began testifying before the grand jury is arguably an interference with Plaintiff's fourteenth amendment right to practice his profession. Plaintiff contends that as a result of the serving of the search warrant and the subsequent search, he was prevented from advising his client immediately before and during the grand jury hearing, when his client specifically twice sought to consult with him. Additionally, when Plaintiff stated that his client's appearance needed to be delayed during this search, his client was instead ordered to immediately appear in front of the grand jury.

Viewing the evidence most favorably for Plaintiff on this motion to dismiss, the Court finds that Defendants did violate Plaintiff's clearly established fourteenth amendment right to practice his profession free from undue governmental interference. The Court thus **DENIES** Plaintiff's motion to dismiss this claim.

c. Substantive Due Process "Shocks the Conscience" Claim.

Lastly, Plaintiff claims that Defendants' conduct is so egregious that it "shocks the conscience" and violates substantive due process notions of decency and fairness. This "shock the conscience" test was first expressed in Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209 (1952), where police officers in search of evidence forcibly pumped the stomach of a criminal suspect. This type of substantive due process claim has most often been invoked in relation to police brutality and unwanted body manipulation, but has also been applied to relentless questioning of a suspect. Cooper v. Dupnik, 963 F.2d 1220, 1249, 1250 (9th Cir. 1992).

The Supreme Court has not set out specific standards for the test. Id. The Court finds here that Defendants' alleged conduct was not so lacking in decency and fairness that their actions violated Plaintiff's substantive due process right. Thus, Defendants have qualified immunity for Plaintiff's substantive due process claim.

D. Qualified Immunity No Defense to Injunctive Relief

Qualified immunity is not a defense to a claim for injunctive relief. American Fire v. Gillespie, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiff petitions for both damages and

injunctive relief. As discussed above, Plaintiff's claim for damages should be dismissed on the grounds that Defendants have qualified immunity which protects them from civil suits for damages, but Plaintiff's claim for injunctive relief is more appropriately considered on a motion for summary adjudication.

E. Leave to Amend Complaint

Fed. R. Civ. P. 15(a) states that leave to amend pleadings "shall be freely given when justice so requires." However, leave may be denied when amendment would cause undue delay, would be made in bad faith, would be futile, or would cause prejudice to the opposing party. Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973). Leave to amend need not be granted if the court determines that allegation of other facets consistent with the challenged pleading could not correct the deficiency. Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988); Schreiber Dist. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986).

In this case, the Court determines that it would be futile to grant Plaintiff leave to amend his pleadings in regard to his First Claim for damages, which alleges fourth amendment violations, and his Second Claim for damages, subsections (c) (alleged violation of fourth and fourteenth amendments based on Cal. Penal Code § 1524) (e) (alleged violation of sixth and fourteenth amendment based on Cal. R. Prof. Conduct 2-100), and (f) (alleged violation of attorney-client privilege). The Court thus dismisses those claims without leave to amend.

IV. CONCLUSION

Defendants Conn and Najera's Rule 12(b)(6) motion to dismiss is hereby **DENIED** as to subsection (d) of

Plaintiff's Second Claim for the violation of his fourteenth amendment right to practice his profession, and as to Plaintiff's claims for injunctive and declaratory relief. Defendants' Rule 12(b)(6) motion to dismiss is hereby **GRANTED** on the basis of qualified immunity as to Plaintiff's remaining claims for damages against Defendants Com and Najera. Plaintiff's claims for fourth amendment violations, violations of the attorney-client privilege, violations of Cal. Rule Prof. Conduct 2-100, and violations of Cal. Penal Code § 1524 are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

/s/ RONALD S W LEW
RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

Dated: September 27, 1994

CV 94-4227-RSWL Gabbert v. Conn, Najera et al., Defendants Conn and Najera' 12(b)(6) motion to dismiss.

(Gabbert1.order/j)

FILED
FEB 8 1995
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	
	)	
Plaintiff,	)	CV 94-4227-RSWL (Ex)
	)	
vs.	)	
	)	ORDER RE:
DAVID CONN, et al.	)	LEAVE TO AMEND
	)	
Defendants.	)	
	)	

I. Introduction

Plaintiff Paul Gabbert brings this action as a result of the police search he underwent on March 21, 1994. Gabbert, an attorney, was served with a search warrant and searched at the Beverly Hills Courthouse, where he was representing a client who was being investigated by the Los Angeles District Attorney's office. On September 27, 1994, this Court dismissed with prejudice Gabbert's original complaint, except for his Fourteenth Amendment claim for interference with his right to practice his profession. Gabbert now moves for leave to file a First Amended Complaint.

II. Discussion

A. Standard for Leave to Amend

Fed. R. Civ. P. 15(a) allows a party to amend its pleading once as a matter of course before the pleading is served. Plaintiff's complaint has already been served. Rule 15(a) further provides that after service,

> a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Denial of leave to amend a complaint is proper only when amendment would be futile, frivolous, unduly prejudicial, would cause undue delay, or is made in bad faith. Schlacter-Jones v. General Telephone, 936 F.2d 435, 443 (9th Cir. 1991); United Union of Roofers v. Insurance Corp. of America, 919 F.2d 1398, 1402 (9th Cir. 1990); Howey v. United States, 481 F.2d 1187, 1190 (9th Cir. 1973).

Plaintiff seeks to amend his complaint to add a state cause of action under Cal. Penal Code § 1524 against Defendants Conn, Najera, Zoeller and Oppenheim as individuals, and against the County of Los Angeles and the City of Beverly Hills. Defendants Conn and Najera, the district attorneys allegedly involved in the search at issue, oppose this motion for leave to amend. Defendant Zoeller, the Beverly Hills Police detective allegedly involved in the search , has also filed an opposition to Plaintiff's motion for leave to amend his complaint.

Defendants oppose the motion on the grounds that Plaintiff's Fourteenth Amendment claim is based in part on events leading up to the March 21, 1994 search, and that this Court clearly dismissed with prejudice any such claims. Moreover, defendants contend that Plaintiff's attempt to

amend his complaint is futile because no cause of action exists under §1524.

B. Plaintiff Does Not Attempt to Reiterate Previously Dismissed Claims

Inasmuch as Plaintiff attempts to base his Fourteenth Amendment claim on events preceding the March 21, 1994 search, this Court has dismissed such claims with prejudice. however, to the extent that Plaintiff alleges those preceding events as factual background, rather than as grounds for his remaining Fourteenth Amendment claim, this Court will allow the allegations.

C. The Court Declines to Exercise Supplemental Jurisdiction Over Plaintiff's State Law Claim

Under California law, a public entity may be held civilly liable only under a statute imposing liability. Cal. Gov't Code § 815; Swaner v. City of Santa Monica, 150 Cal.App.3d 789, 797, 198 Cal.Rptr. 208, 212-13 (Cal. App. 2 Dist. 1984). Cal. Gov't Code § 950.2 further provides that an action against the employer would be barred. The liability of the individual defendants, as well as the liability of the City of Beverly Hills and County of Los Angeles, therefore depends on a finding of public entity liability.

Plaintiff here asserts a claim under Cal. Penal Code §1524 (c), which provides that special procedures must be followed when searches are conducted pursuant to search warrants issued for documentary evidence in the possession of a lawyer. Defendants argue that Cal. Penal Code § 1524 is merely procedural and imposes no civil liability. Cal. Gov't Code § 815.6 provides that

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Thus, in order to determine whether Plaintiff can state a claim under Cal. Penal Code § 1524, the Court must analyze that section under the requirements of Cal. Gov't Code § 815.6. Plaintiff cites no cases in which California courts have implied a civil cause of action under Cal. Penal Code § 1524, nor has this Court located any such cases. Thus, the question of whether a cause of action arises under Cal. Penal Code § 1524 is a novel question of state law. Under 28 U.S.C. §1367(c), a district court may decline to exercise supplemental jurisdiction if

> (1) the claim raises a novel or complex issue of State law: [or]
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction.

This claim presents a question of unsettled state law, and the Court may therefore decline to exercise jurisdiction over Plaintiff's Cal. Penal Code §1524 claim. O'Connor v. State of Nevada, 27 F.3d 357, 363 (9th Cir. 1994); see Medrano v. City of Los Angeles, 973 F.2d 1499, 1507 (9th Cir. 1992), cert. denied, -- U.S. --, 113, S. Ct. 2415 (1993); see generally, Executive Software v. U.S. Dist. Court, 24 F.3d 1545, 1552-61 (9th Cir. 1994). Moreover, it is clear that this purported state claim substantially predominates over the one remaining federal claim in this case. On both grounds, this Court declines to exercise supplemental jurisdiction over Plaintiff's § 1524 claim. This Court thus DENIES Plaintiff's

motion for leave to amend his complaint as to the Cal. Penal Code § 1524 claim.

III. Conclusion

This Court thus declines to exercise supplemental jurisdiction over Plaintiff's Cal. Penal Code § 1524 claim because such a claim both presents a novel question of California law and, in addition, substantially predominates over the Plaintiff's one federal claim. On those grounds, this Court DENIES Plaintiff's motion for leave to amend his complaint as to that state claim.

IT IS SO ORDERED.

/s/ RONALD S W LEW
RONALD S. W. LEW
United States District Judge

Dated: February 8, 1995

CV 94-4227-RSWL Gabbert v. Conn, Najera et al., Plaintiff's motion for leave to amend complaint.

(Gabbert.lva/j)

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESSES OF RECORD IN THIS ACTION ON THIS DATE.
DATED: 2/8/95
/s/ Helen G. Fagan
DEPUTY CLERK

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
DENNIS M. GONZALES,
Principal Deputy County Counsel
KEVIN BRAZILE,
Principal Deputy County Counsel
State Bar No. 113355
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
Telephone: (213) 974-1943

Attorneys for Defendant
CONN and NAJERA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227-RSWL (Ex)
Plaintiff,	)	
	)	SEPARATE
vs.	)	STATEMENT OF
	)	UNCONTROVERTED
DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER AND DOES 1 through X.	)	MATERIAL FACTS AND CONCLUSIONS OF LAW
	)	
	)	DATE: SEPTEMBER 25, 1995
Defendants.	)	TIME: 9:00 A.M.
	)	COURTROOM:

TO PLAINTIFF PAUL GABBERT AND YOUR ATTORNEY OF RECORD:

Defendants David Conn and Carol Najera hereby submit the attached statement of uncontroverted material facts and conclusions of law.

Uncontroverted Material Facts	Supporting Evidence
1. On March 21, 1994, plaintiff met his client, Tracy Baker at the Los Angeles Criminal Courts building at about 7:30 a.m.	Exhibit "3" at pages 33-34 of Transcript.

2. On March 21, 1994, plaintiff met Tracy Baker on the 13th floor where the grand jury room is located.	Exhibit "3" at page 34 of transcript.
3. Prior to Ms. Baker's testimony plaintiff knew he would not be allowed in the grand jury hearing room with her an that he had to remain outside in the waiting area.	Exhibit "3" at page 35 of transcript.
4. Plaintiff checked Tracy Baker in with the grand jury bailiff at 8:30 am. on March 21, 1994.	Exhibit "3" at page 36-37 of transcript.
5. Tracy Baker's testimony before the grand jury began at 10:54 a.m. on March 21, 1994.	Exhibit "4".
6. After Defendants Conn and Najera entered the grand jury hearing room Tracy Baker was tend before the grand jury.	Exhibit "3" at pages 50-51 of transcript.
7. Immediately after defendant Zoeller presented plaintiff with a search warrant for his person and briefcase Tracy Baker was called before the grand jury.	Exhibit "3" at pages 53 of transcript.
8. Once plaintiff was presented with the search warrant he said "we'll need a private room," and then plaintiff and Oppenheim went to a private room.	Exhibit "3" at pages 54.

9. After being presented with the warrant, plaintiff and Oppenheim went into an office space alone.	Exhibit "3" at pages 55-56, 61-62 of transcript.
10. Plaintiff was only searched by Oppenheim during the first search.	Exhibit "3" at pages 56-57, 67-68 of transcript.
11. While plaintiff was being searched by Oppenheim he was advised that this client wanted to speak with him.	Exhibit "3" at page 57 of transcript.
12. The second search of plaintiff occurred after Oppenheim completed his search of plaintiff's briefcase.	Exhibit "3" at page 69 of transcript.
13. Defendants Conn and Najera were present when the second search of plaintiff by defendant Zoeller, was commenced outside of the grand jury hearing room.	Exhibit "3" at page 70 of transcript.
14. During the second search defendant Conn left and Najera stayed with Zoeller until Zoeller completed the search.	Exhibit "3" at pages 70-71 of transcript.
15. Defendant Carol Najera conducted all of the examination and questioning of Tracy Baker before the grand jury.	Declaration of Carol Najera at paragraphs 4-7

16. Tracy Baker was present and outside of the grand jury hearing room when Zoeller conducted the second search.	Exhibit "3" at pages 71-72 of transcript.
17. The second search conducted by Zoeller on plaintiff lasted about five (5) minutes.	Exhibit "3" at pages 71-72 of transcript.
18. After the second search plaintiff conferred with Tracy Baker in a private room about what she was being asked in the grand jury.	Exhibit "3" at pages 73, 107-108 of transcript.
19. Plaintiff contends that the only occasion he didn't have access to his client, in his mind, was when he was being searched by Oppenheim.	Exhibit "3" at pages 76-77 of transcript.
20. Plaintiff conferred with Tracy Baker before the contempt proceeding commenced in Dept. 110 before Judge Florence Marie Cooper.	Exhibit "3" at pages 78 of transcript.
21. Plaintiff contends and alleges that the only time he was prevented from giving legal advice to his client on March 21, 1994 was when he was being searched by Oppenheim.	Exhibit "3" at page 83 of transcript.
22. Plaintiff did not sustain any loss of earnings due to the incident.	Exhibit "3" at pages 84 of transcript.

23. Plaintiff did not sustain any medical expenses due to the incident.	Exhibit "3" at pages 83-84 of transcript.
24. Plaintiff never advised defendant Conn that his client (Baker) wanted to speak with him (Gabbert).	Exhibit "3" at pages 99-100 of transcript.
25. On March 21, 1994 while in the courthouse cafeteria and before Tracy Baker testified before the grand jury she was given legal advice by plaintiff.	Exhibit "5" at pages 43-44 of transcript.
26. After leaving the courthouse cafeteria Baker and plaintiff went to check in with the grand jury bailiff.	Exhibit "5" at pages 46 of transcript.
27. While in the hallway during a 45 minute period of time before her grand jury testimony began, plaintiff gave Baker legal advice.	Exhibit "5" at pages 47 of transcript.
28. When Baker entered the grand jury hearing room defendants Conn and Najera were inside of the grand jury hearing room.	Exhibit "5" at pages 55 of transcript.
29. After Baker was allowed to leave the grand jury room at her request, she got an indication that she should go back in to the grand jury and assert her fifth amendment right.	Exhibit "5" at pages 58-59; and 61 of transcript.

30. Tracy Baker was present and outside the grand jury room when Zoeller searched plaintiff.	Exhibit "5" at pages 67-68 of transcript.
31. Tracy Baker believed plaintiff would be in the waiting area while she testified before the grand jury.	Exhibit "5" at pages 68-69 of transcript.
32. After defendant Conn advised Baker she was going to be held in contempt she exited the grand jury hearing room where she observed Zoeller searching plaintiff.	Exhibit "5" at pages 76, 88-89 of transcript.
33. Tracy Baker believes Zoeller searched plaintiff for about five or ten minutes while she was present.	Exhibit "5" at pages 87-88 of transcript.
34. Tracy Baker believes Conn and Najera were present when Zoeller searched plaintiff.	Exhibit "5" at pages 89 of transcript.
35. Zoeller did not find anything he was looking for at the conclusion of his search of plaintiff.	Exhibit "5" at pages 89 of transcript.
36. Tracy Baker knew she would be questioned about Lyle Menendez before she went before the grand jury.	Exhibit "5" at pages 95 of transcript.
37. On March 21, 1994, the grand jury proceedings began at 10:20 a.m.	Exhibit "2" at page 1 of transcript.

38. On March 21, 1994 the grand jury proceeding was conducted for investigative purposes only and not an indictment.	Exhibit "2" at pages 2-9 of transcript.
39. On March 21, 1994, Leslie Zoeller was the first person to testify before the grand jury.	Exhibit "2" at page 11 of transcript.
40. Tracy Baker was called to testify before the grand jury after Leslie Zoeller.	Exhibit "2" at pages 24 of transcript.
41. Tracy Baker was questioned before the grand jury by Carol Najera.	Exhibit "2" at page 24 of transcript.
42. When Baker was asked before the grand jury whether she was acquainted with Lyle Menendez she asked for permissions to confer with her attorney for a moment.	Exhibit "2" at page 25 of transcript.
43. Pursuant to her request Tracy Baker was allowed to leave the grand jury room to confer with her attorney.	Exhibit "2" at page 25 of transcript.
44. When Tracy Baker was recalled before the grand jury and again was asked if she was acquainted with Lyle Menendez, on the advice of counsel she asserted her fifth amendment privilege.	Exhibit "2" at page 26 of transcript.

45. When Ms. Baker was asked did she know Lyle Menendez in August, 1989, she again asked to confer with counsel and her request was granted and she exited the grand jury.	Exhibit "2" at pages 26-27 of transcript.
46. When Tracy Baker was asked a second time, if she knew Lyle Menendez in August of 1989, she once again, based on the advice of counsel, asserted her fifth amendment rights.	Exhibit "2" at page 27 of transcript.
47. When Tracy Baker was asked if she brought the documents called for in the subpoena she again asked to confer with her attorney.	Exhibit "2" at page 27 of transcript.
48. After Tracy Baker's request to confer with her attorney regarding the subpoena, the grand jury recessed so that a contempt hearing could be held in Dept. 110 before Judge Florence Marie Cooper.	Exhibit "2" at pages 27-31 of transcript.
49. Plaintiff attended and represented his client at the contempt proceeding in Department 110.	Exhibit "2" at page 36 of transcript.
50. Tracy Baker's grand jury testimony was completed at 11:12 a.m.	Exhibit "4".

51. The contempt proceeding commenced at 11:40 a.m.	Exhibit "2" at page 33 of transcript.
52. Defendants Conn and Najera did not refuse any of Tracy Baker's requests to confer with her attorney.	Declaration of Conn at paragraph 8 and Najera at paragraph 8.
53. Defendant Conn and Najera did not prevent Tracy Baker from conferring with her attorney.	Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.
54. Defendants Conn and Najera did not deny Tracy Baker access to plaintiff.	Declaration of Conn at paragraphs 4-7 and Najera at paragraphs 4-7.
55. Defendants Conn and Najera did not deny Tracy Baker access to plaintiff.	Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.
56. Defendants Conn and Najera did not deny plaintiff access to his client.	Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.
57. Defendants Conn and Najera did not prevent plaintiff from conferring with his client.	Declaration of Conn at paragraphs 4-8 and Najera at paragraphs 4-8.

Conclusion of Law

1. A prosecutor is entitled to qualified immunity when his conduct does not violate clearly established law. Romero v. Kitsap County 931 F.2d 624 (9th Cir. 1991).

2. A prosecutor is entitled to qualified immunity even if he mistakenly violates clearly established law when his conduct is objectively reasonable under preexisting law. See Romero v. Kitsap County id.

3. Plaintiff bears the burden of proof on establishing whether the law is clearly established. See Romero v. Kitsap County id.

~~4. A prosecutor is entitled to absolute immunity for conduct intimately associated with judicial phase of the criminal process. See Imbler v. Pachtman 424 U.S. 409 (1976).~~

~~5. A prosecutor is entitled to absolute immunity for conduct occurring during or related to grand jury proceedings. See Gray v. Bell 712 F.2d 490 (D.C. Cir. 1983); Marlowe v. Coakley 404 F.2d 70 (9th Cir. 1968).~~

~~6. The doctrine of vicarious liability does not apply to Section 1983 claims. See Palmer v. Sanderson 9 F.3d 1433 (9th Cir. 1994).~~

~~7. Proximate cause is an essential element of a Section 1983 action. See Arnold v. I.B.M. 637 F.2d 1350 (9th Cir. 1981).~~

Dated: August 28, 1995

DE WITT W. CLINTON
County Counsel

By: /s/ KEVIN C. BRAZILE
KEVIN C. BRAZILE
Principal Deputy County Counsel
Attorneys for Defendant
CONN AND NAJERA

IT IS SO ORDERED.

DATED Oct 3, 1995

/s/ RONALD S W LEW
UNITED STATES DISTRICT JUDGE

DE WITT W. CLINTON, County Counsel
S. ROBERT AMBROSE, Assistant County Counsel
DENNIS M. GONZALES,
Principal Deputy County Counsel
KEVIN BRAZILE,
Principal Deputy County Counsel
State Bar No. 113355
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012-2713
Telephone: (213) 974-1943

Attorneys for Defendant
CONN and NAJERA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227-RSWL (Ex)
Plaintiff,	)	
	)	
vs.	)	~~PROPOSED~~ JUDGMENT
DAVID CONN, CAROL NAJERA, ELLIOT OPPENHEIM, LESLIE ZOELLER AND DOES 1 through X.	)	
Defendants.	)	

IT IS HEREBY ORDERED, AJUDGED and DECREED that the Motion for Summary Judgment by defendants David Conn and Carol Najera shall be granted.

Dated: Oct 3, 1995

/s/ RONALD S W LEW
RONALD S.W. LEW
UNITED STATES DISTRICT COURT JUDGE

Taxed costs in sum of $2,578.95 against Plaintiff.

Taxed costs in sum of $1,619.55 against Plaintiff.

FILED
FEB 2 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL L. GABBERT,	)	No. 95-56610
Plaintiff-Appellant,	)	
	)	D.C. No. CV-94-04227-RSWL (Central California)
v.	)	
DAVID CONN; CAROL NAJERA; LESLIE ZOELLER; ELLIOT OPPENHEIM	)	
Defendants-Appellees.	)	ORDER

Before: PREGERSON and HAWKINS, Circuit Judges, and WEINER,* District Judge.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has called for a vote to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

*Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.